LAW BOOKS

PUBLISHED BY

W. MAXWELL & SON,

29, FLEET STREET.

Broom and Hadley's Commentaries.

Commentaries upon the Laws of England. By HERBERT BROOM, LL.D., of the Inner Temple, Barrister-at-Law, Reader in Common Law to the Inns of Court, and EDWARD A. HADLEY, M.A., of Lincoln's Inn, Barrister at Law, late Fellow of Trinity College, Cambridge. This Work is mainly founded upon Blackstone, the chief aim having been to produce such a version of his celebrated Commentaries as their author, if now living, would have produced. In 4 vols. 8vo. Price 3*l.* 3*s.* cloth. 1869.

Williams and Bruce's Admiralty Practice.

The Jurisdiction and Practice of the High Court of Admiralty, including the Practice on Appeals, with Forms of Pleadings, &c.; together with a Supplement, containing the County Courts' Admiralty Jurisdiction Act, 1868, and the General Orders for Regulating the Practice thereof. By ROBERT GRIFFITH WILLIAMS and GAINSFORD BRUCE, of the Middle Temple, Esqrs., Barristers-at-Law. In 1 vol., 8vo. Price 1*l.* 4*s.* cloth. 1869.

A SUPPLEMENT to WILLIAMS and BRUCE'S ADMIRALTY PRACTICE; containing the County Courts' Admiralty Jurisdiction Act, 1868, the Order in Council, and the General Orders made in pursuance of the provisions of the said Act; with Notes and Forms. Price 3*s.* 6*d.* sewed. 1869.

Kerr on Fraud.

A Treatise on the Law of Fraud and Mistake as administered in Courts of Equity. By WILLIAM WILLIAMSON KERR, A.M., Oxon, of Lincoln's Inn, Barrister-at-Law. In 1 vol. 8vo. Price 16*s.* cloth. 1868.

Kerr on Receivers.

A Treatise on the Law and Practice as to Receivers appointed by the Court of Chancery. By WILLIAM WILLIAMSON KERR, M.A., Oxon, of Lincoln's Inn, Barrister-at-Law. 8vo. Price 9*s.* cloth. 1869.

Kerr on Injunctions.

A Treatise on the Law and Practice of Injunctions in Equity. By WILLIAM WILLIAMSON KERR, A.M., Oxon., of Lincoln's Inn, Barrister-at-Law. In 1 vol. royal 8vo. Price 1*l.* 10*s.* cloth. 1867.

Darby and Bosanquet's Statutes of Limitations.

A Practical Treatise on the Statutes of Limitations in England and Ireland. By J. GEORGE N. DARBY, of Lincoln's Inn, and FREDERICK ALBERT BOSANQUET, of the Inner Temple, Esqrs., Barristers-at-Law. 8vo. Price 16*s.* cloth.

Lindley's Law of Partnership. Second Edition.

A Treatise on the Law of Partnership, including its application to *Joint Stock* and *other Companies*. By NATHANIEL LINDLEY, Esq., of the Middle Temple, Barrister-at-Law. In 2 vols. Royal 8vo. Price 3*l.* 3*s.* cloth. 1867.

Lewin's Law of Trusts and Trustees. Fifth Edition.

A Practical Treatise on the Law of Trusts and Trustees. By THOMAS LEWIN, Esq., of Lincoln's Inn, Barrister-at-Law. Price 1*l.* 16*s.* cloth. 1867.

Holt's Rule of the Road.

Admiralty Court Cases on the Rule of the Road, as laid down by the Articles and Regulations now in force, under Order in Council for preventing Collisions at Sea. By WILLIAM HOLT, B.A., of the Inner Temple, Barrister-at-Law. 8vo. Price 10*s.* 6*d.* cloth. 1867.

Haynes' Outlines of Equity. Second Edition.

Outlines of Equity; being a Series of Elementary Lectures on Equity Jurisdiction, delivered at the request of the Incorporated Law Society; with Supplementary Lectures on certain Doctrines in Equity. By FREEMAN OLIVER HAYNES, of Lincoln's Inn, Barrister-at-Law, and late Fellow of Caius College, Cambridge. Crown 8vo. Price 12*s.* cloth. 1865.

Smith's Leading Cases. Sixth Edition.

Smith's Selection of Leading Cases in various Branches of the Law, with Notes. By JAMES SHAW WILLES, of the Inner Temple, now one of the Judges of Her Majesty's Court of Common Pleas, and HENRY SINGER KEATING, Esq., of the Inner Temple, one of the Judges of Her Majesty's Court of Common Pleas. Sixth Edition. By F. P. MAUDE and T. E. CHITTY, Esqrs., Barristers-at-Law. In 2 vols. Royal 8vo. Price 3*l.* 10*s.* 1867.

Broom's Commentaries. Fourth Edition.

Commentaries on the Common Law, designed as introductory to its study. By HERBERT BROOM, LL.D., Barrister-at-Law, Reader in Common Law to the Inns of Court. In 1 vol. 8vo. Price 1*l.* 11*s.* 6*d.* 1869

Broom's Legal Maxims. Fifth Edition.

A Selection of Legal Maxims, Classified and Illustrated. By HERBERT BROOM, LL.D., Barrister-at-Law. 8vo. (*In the Press.*)

Broom's (Dr. Herbert) Constitutional Law.

Constitutional Law, viewed in relation to Common Law, and exemplified by Cases. By HERBERT BROOM, LL.D., Barrister-at-Law, Reader in Common Law to the Inns of Court. In 1 vol. 8vo. Price 1*l.* 11*s.* 6*d.* cloth. 1866.

White and Tudor's Leading Cases in Equity. Third Edition.

A Selection of Leading Cases in Equity; with Notes; in Two Volumes. Vol. I.—By FREDERICK THOMAS WHITE and OWEN DAVIES TUDOR, Esqrs., of the Middle Temple, Barristers-at-Law. Vol. II.—By OWEN DAVIES TUDOR, Esq., of the Middle Temple, Barrister-at-Law. In 2 vols. Royal 8vo. Price 3*l.* 10*s.* cloth. 1866.

Smith's Law of Landlord and Tenant. Second Edition.

The Law of Landlord and Tenant, being a Course of Lectures delivered at the Law Institution. By JOHN WILLIAM SMITH, Esq., late of the Inner Temple, Barrister-at-Law, Author of "A Selection of Leading Cases," &c. Second Edition, with Notes and Additions, by FREDERICK PHILIP MAUDE, Esq., of the Inner Temple, Barrister-at-Law. 1 vol. 8vo. 16*s.* cloth. 1866.

Frend and Ware's Precedents of Conveyances.

Precedents of Conveyances, and other Instruments relating to the Transfer of Land to Railway Companies; with considerable Additions and Alterations, and a Treatise upon the Consolidation Acts. By DECIMUS STURGES and T. L. MURRAY BROWNE, of Lincoln's Inn, Barristers-at-Law. In 1 vol. 8vo. Price 1*l.* cloth. 1866.

THE

LAW OF COMMERCE

IN

TIME OF WAR,

WITH

PARTICULAR REFERENCE TO THE RESPECTIVE RIGHTS AND DUTIES OF BELLIGERENTS AND NEUTRALS,

BY

EDWARD JAMES CASTLE,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

"Sileant ergo leges inter arma, sed civiles illæ et judiciariæ et pacis propriæ, *non aliæ perpetuæ et omnibus temporibus accommodatæ.*"—GROTIUS.

LONDON:
WILLIAM MAXWELL & SON, 29, FLEET STREET, E.C.
Law Booksellers and Publishers;
HODGES, FOSTER, & CO., AND E. PONSONBY, DUBLIN;
THACKER, SPINK, & CO., CALCUTTA.
1870.

LONDON :
BRADBURY, EVANS, AND CO., PRINTERS, WHITEFRIARS.

PREFACE.

THE sudden outbreak of hostilities within the last few weeks has induced the Author to publish in a separate form the following pages, which were originally written for a more comprehensive work on the general Law of Affreightment.

The object the Author had in doing so, was to afford assistance as much to the mercantile public as to the profession. The lawyer has always the works of the well-known authorities on International Law, and the decisions of the English and Foreign Courts ready at his hand for reference. The following pages, therefore, offer him little more than a digest of established cases and recognised opinions on the particular branch of International Law. With merchants and traders the case is different; they have neither the time nor opportunity to refer to works of this description. On the outbreak of hostilities there is at once a new order of things. The ordinary landmarks of commerce are removed, and the rules and obligations that are con-

sidered absolutely binding in the time of peace, are at once relaxed or broken through by the exigences of war. And this effect is felt in a higher degree by maritime traders than by any other class of the community. Often their ships are surprised in distant ports by the sudden change, and they find themselves burdened with cargoes that they are not permitted to unload, or fettered with contracts that it is illegal to carry out; and they may be unable to obtain either assistance or advice, and have to trust entirely to their own resources. This work, therefore, has been written with the hope that it may supply a want to the mercantile community; for, though the science of International Law is in a great degree in its infancy, and many of its problems are yet unsolved, still there are a great many points decided, whose authority is recognised. The Author, with this view, has not entered into the disputed questions of International Law, but has, in general, dealt only with the cases decided in the English and American Courts, especially those before Lord Stowell, supporting these cases, where possible, by the views of the English and American writers on International Law; and more particularly he acknowledges the assistance he has derived from the last edition of Wheaton's International Law by Mr. Dana.

4, Brick Court, Temple,
31*st August*, 1870.

TABLE OF CASES.

ENGLISH.

AMERICAN.

TABLE OF CONTENTS.

SECT. III.—DECLARATION OF WAR.

PART II.

NEUTRAL TRADE.

SECT. I.—PRIVILEGES OF NEUTRALS.

SECT. II.—VIOLATION OF NEUTRALITY.

SECT. III.—RIGHT OF SEARCH.

PAGE

SECT. IV.—SHIP'S PAPERS.

SECT. V.—CONTRABAND.

SECT. VI.—CONTRABAND PERSONS AND PAPERS.

SECT. VII.—BLOCKADE.

SECT. VIII.—PENALTIES FOR VIOLATION OF NEUTRALITY.

THE LAW OF COMMERCE

IN

TIME OF WAR.

PART I.

TRADE BETWEEN BELLIGERENTS.

Introduction.—The immediate effect of the commencement of hostilities between two nations, or between different sections of the same nation—in the latter case the war is known as civil war—is to render many of the ordinary operations of commerce illegal; either by the municipal or domestic law of nations, or by international law; the latter consisting of those rules which the independent societies of men, termed nations, have consented to submit to and to be guided by.

The difference of the effect of illegality in a contract by the municipal law, and of illegality by international law, is this: Where the policy of a State has declared certain contracts to be illegal, it refuses all aid in enforcing the contract or in the recovery of damages for any breach of it; it will not permit impure hands to touch the fountains of justice; and where necessary, it can and will go further, and punish criminally the persons infringing the rules laid down for the general good. But where the contract is illegal by the law of nations or international law only, in general the municipal law will neither punish nor refuse to give effect to such contracts. But in these cases the Government of the individual who breaks the rules of

international law stands aloof, and allows the offender to be punished by the operation of the law he has broken. As a rule a citizen of a State is entitled to demand from his Government protection for himself and property, and in general such protection is afforded, even, as in the case of the late Abyssinian war, at an enormous cost to the State. But where a private citizen, as in the case of a member of a neutral State, breaks the rules of international law, *e. g.*, by running a blockade, supplying a belligerent with contraband articles of war, &c., then the neutral Government will neither punish the individual nor refuse to give effect to his contract in its municipal courts, for such contracts are not against its municipal law. But the Government will refuse its protection in case of capture of the property of the person who persists in entering into such contracts; so that while a State takes an active part in enforcing the regulations of its own municipal law, it is merely negative, and does not assist but permit the carrying into execution of the penalties of offended international law. It is necessary to notice this distinction, because too often odium is thrown on the Government of a State because its municipal law is powerless to enforce the dictates of international law, as in the case of *The Alabama*. In some cases, however, as in the Foreign Enlistment Acts of Great Britain and corresponding statutes in other countries, the municipal law has been strengthened so as to carry out some of the rules of international law. The reason of this distinction is the difference in the interests of belligerents and neutrals. The latter claim to have their commerce with either side as little interrupted as possible; the former demand that no assistance shall be offered by the neutral to the combatants. Commerce and civilization have so entwined the interests of different nations one with the other that on the sudden outburst of war the neutral too often finds his markets shut, his manufacture crippled, his commerce dispersed, and his capital and industry unable to find channels of employment unless he persists in

carrying his trade on as far as possible as if no war existed. With the belligerent it is different. He claims that in the deadly struggle in which he is engaged that no assistance shall be rendered his adversary. In the face of these two interests a system has been laid down which the neutral State refuses to enforce, but yet submits to. The remedy for the infringement of international law, therefore, is rather against the property than against the persons entering into the contract; and even against that there is only a qualified right of action. The property must be taken in the act of breaking the rule of international law, and then it is liable to be confiscated by the captor, after being properly adjudicated a prize in the prize courts of his country.

International Law.—The rules of modern international law are to be found in the decisions of Lord Stowell,* the authority of which is not only recognised by this, but also by other nations who have adopted them on account of their impartial justice. Two causes appear to have produced this effect: the one, the unrivalled power of Great Britain on the seas, which enabled her to follow a generous and enlightened policy; the other, the impartial administration of Lord Stowell, which cannot be better described than in his own words†:—

"In forming this judgment, I trust that it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me, namely, to consider myself as stationed here, not *to deliver occasional and shifting opinions to serve present purposes of particular national interest,* but to administer with indifference that justice which the law of nations holds out without distinction to independent States, some happening to be neutral, and some to be belligerent. The seat of judicial authority is, indeed, locally here in the belligerent country, according to the known law and practice of nations, but the law itself has no locality. It is the duty of the

* See Wheaton's Int. Law.

† *The Maria*, 1 Rob. 340.

person who sits here to determine this question exactly as he would determine the same question at Stockholm—to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duty on Sweden as a neutral country which he would not admit to belong to Great Britain in the same character."

On the outbreak of war there are two classes of commercial contracts affected by the change of circumstances. The first is, where one or both of the contracting parties are members of one of the belligerent States; the other where the parties are neutral. The declaration of hostilities affects these two classes of contracts differently, and therefore this work is divided into two parts.

I. The effect of war on the commerce of belligerents.

II. The effect of war on the commerce of neutrals.

SECT. 1.—TRADE BETWEEN BELLIGERENTS IS ILLEGAL.

The principal effect of war on the commercial intercourse between the two contending nations is to render all trading illegal except by licence of the Sovereign, and all contracts made during the existence of war are absolutely null and void, the only exceptions that are recognised being the case of bills of exchange drawn by prisoners of war for their own subsistence, and the case of ransom-bills, as they are termed, being bills given by captured merchant ships to the captors as a ransom. These bills are now declared illegal by the law of Great Britain,* though still recognised by some countries; and when they were

* 43 Geo. III., c. 160, ss. 33—36. By sec. 34, ransom of British ships or goods is declared illegal, "unless in the case of extreme necessity to be allowed by the Court of Admiralty."

legal by the law of this country the enemy could not sue upon them in their own name, an enemy having no *locus standi in judicio.** But there is this difference made between a right of action accruing before hostilities and that accruing during their continuance; in the case of the latter, as we have seen, the parties have no remedy at law, the contract being illegal *ab initio*, (and therefore it is to be presumed that there would be no remedy if the contract were made during war, though the breach did not accrue till hostilities had ceased,) while in the former case the right of action is not destroyed, but only suspended, until peace is proclaimed. Where, therefore a contract had been broken before war commenced, though the party had refused to complete on account of impending hostilities,† the party at fault would be liable to the other in an action for damages as soon as peace should be proclaimed, the same as if no war had intervened. So that where a contract is made and broken before war, a plea in an action brought after the war begins, that defendant is an alien enemy, is in abatement, but if the breach took place during the war, such a plea would be in bar.‡

All trading with the enemy being illegal, it follows that where two subjects of a State have entered into a contract of affreightment, the object of which is to trade with another State which before the completion of the contract is engaged in war with the first State, that such a contract becomes illegal, and is dissolved,§ as Pollock, C.B., says in *Esposito* v. *Bowden*.‡ The case of war is an exception implied in the contract, as the termination of life is an exception implied in many other contracts.

There is this difference between the exception of war and the exceptions ordinarily introduced into charter-parties and bills

* *The Hoop*, 1 Rob. 196, vide *post*.

† *Pole* v. *Cetovich*, 9 C. B. N. S. 430; 30 L. J. C. P. 102.

‡ *Esposito* v. *Bowden*, 4 E. & B. 963.

§ *Reid* v. *Hoskins*, 5 E. & B. 729; 25 L. J. Q. B. 55.

of lading. The latter are in favour of the shipowner only, and fail to protect the charterer from a breach; but the exception of war being implied by the interpretation of the law, relieves both parties from a breach of the contract, even where one is a neutral. The reason for this reciprocity is thus stated by Mr. Justice Willes in *Esposito* v. *Bowden* * :—

"It is clear that the charterer could maintain no action against the shipowner for refusing to take on board a cargo which the charterer could only load by dealing and trading with the enemy; and, on the other hand, neither ought the shipowner to maintain an action against the charterer for not doing so. This is not an unequal law, because, if war had broken out between the Czar and the King of the Two Sicilies instead of Her Majesty, the vessel would, according to the principle stated above, have been absolved from going to Odessa, and might forthwith have proceeded on another voyage. Even the common principle of reciprocity, therefore, points out that a similar indulgence ought to be allowed to a merchant when, in consequence of war declared by his sovereign, he is involved in like difficulties. Under these circumstances, in all ordinary cases, the more convenient course for both parties seems to be that both should be at once absolved, so that each on becoming aware of the fact of a war, the end of which cannot be foreseen, making the voyage, or the shipment, presumably illegal for an indefinite period, may at once be at liberty to engage in another adventure, without waiting for the bare possibility of the war coming to an end in sufficient time to allow of the contract being fulfilled, or for some other opportunity of lawfully performing the contract perchance arising."

The case of *Esposito* v. *Bowden*,* as it is the latest decision, and contains the clearest exposition of the effect of war on the contract of affreightment, may fairly be considered as the leading case on this subject. And the decision is the more

* 7 E. & B. 763; 27 L. J. Q. B. 17.

important because during the long peace the law involved in the question of war has been permitted to slumber, and because it reversed the judgment of the Court of Queen's Bench, which had decided in favour of the plaintiff, on the ground that, although the effect of war was to render all trading with the enemy illegal, yet there was in the circumstances of the case sufficient evidence to satisfy the Court that the contract might have been fulfilled without the necessity for any such illegal trading with the enemy. The case was taken to the Exchequer Chamber, and the decision reversed for the reasons given by Mr. Justice Willes, who read the judgment of the Court. The judgment being too long to be set out *in extenso*, only the salient points are given here. The facts of the case are sufficiently pointed out, in the judgment as follows :—

"The principal question in this case * is, as to the validity of the plea. It is, in effect, whether a charter-party — made before the late Russian war, between an English merchant and a neutral shipowner, whereby it was agreed that the neutral vessel should proceed to Odessa, a port of Russia, and there load from the freighter's factors a complete cargo of wheat, seed, or other grain, and proceed therewith to Falmouth, with usual provisions as to laying days and demurrage;—was dissolved by the war between England and Russia? alleged by the charterer in his plea (which is to be taken as true for the purposes of the present discussion) to have broken out before the vessel arrived at Odessa, and to have continued up to and during the time when the trading was to have taken place. It being further alleged in the plea, that from the time war was declared it became and was impossible for the charterer to perform his agreement, without dealing and trading with the Queen's enemies." In the Court below,† Lord Campbell held that this last averment in the plea "was merely a suggestion of a legal

* *Esposito* v. *Bowden*, Ex. Ch., 7 E. & B. 763; 27 L. J. Q. B. 17.
† *Esposito* v. *Bowden*, 4 E. & B. 974.

conclusion from the premises." If true, as a matter of fact, it was a complete answer to the declaration.

The learned Judge then proceeded to investigate this question, and in doing so enunciated the following propositions :—

1st. It is now fully established that the presumed object of war, being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country; and that such intercourse, except with the licence of the Crown, is illegal.

2nd. That it is illegal for a subject in time of war, without licence, to bring from an enemy's port, even in a neutral ship, goods purchased in the enemy's country after the commencement of hostilities, although not appearing to have been purchased from an enemy; in effect, that trading with the inhabitants of an enemy's country is trading with the enemy.

3rd. The force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy, except by the Queen's licence. As an act of State done by the virtue of the prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law.

4th. That the effect of war upon contracts of affreightment, made before, but which remain unexecuted at, the time it is declared, and of which it makes the further execution unlawful or impossible, as established by the authorities, is to dissolve the contract, and to absolve both parties from further performance of it.

5th. There is high authority for saying that the removal of merchandise, even though acquired before the war from the enemy's country, after knowledge of the war, without a royal

licence, is generally illegal . . . . . and in such cases the circumstance of previous purchase seems, as a general rule, to be matter for the consideration of the Crown, in its clemency alone.

Having laid down these general principles, the learned Judge proceeded to point out that, in the present case, where the ship was neutral, that apart from any considerations affecting the shipowner only, the defence was valid by reason of the law forbidding the charterer to load a cargo, and as a consequence of the prohibition, dissolving the charter-party, and absolving both parties from further performance; and that in order to escape the application of this argument, founded upon the principles above stated, it is necessary for the shipowner to establish that the plea of the charterer cannot be true in alleging an impossibility of performance without dealing and trading with the enemy, or, in other words, that the charterer could, but for some default of his own, and notwithstanding the war, have fulfilled his contract in a lawful manner.

The Court below* had held that there was a possibility, and even a probability, that the charterer might have fulfilled his contract lawfully, although war should have broken out between Russia and England before the ship was loaded; and that therefore it seemed contrary to natural justice to throw the loss entirely upon that party who was ready and able to perform the contract, and to whom no default could be imputed.* Willes, J., in his judgment, points out the fallacy of this position, and proceeds to consider the arguments advanced, which were, first, "The contract admitted of being fulfilled after the war by purchasing the cargo from her Majesty's subjects, or those of her allies, at Odessa." But this the learned Judge answers by showing:—

That the charterer was not to be compelled to seek out at his

* *Esposito* v. *Bowden*, 4 E. & B. 978.

peril persons who were possessed of goods under circumstances which established a right to remove them from the enemy's country without a licence.

That by the second principle laid down, that goods purchased in the enemy's country after the war broke out, though not from enemies, could not without a licence lawfully be shipped thence during the war, even in a neutral vessel.

And that if the goods could have been lawfully shipped, that necessarily involved dealing and trading with the enemy by payment of custom-house and export dues, &c., and thus supplying the enemy directly with the means of carrying on the war.

The second argument was, that the charterer was in default in not providing a cargo before the war and keeping it until the war, and thereafter until the arrival of the neutral vessel, then to be lawfully loaded in pursuance of the charter-party.

But this, as the learned Judge pointed out, was to compel one of her Majesty's subjects to do that which he has not contracted to do, in order to save himself from being unable to perform his contract by reason of the possible event of a declaration of war, intended to injure the Queen's enemies, not her own subjects, nor those of her allies.

And that even if the property had been obtained before the war, and kept in the enemy's country with the intention of fulfilling his contract when the vessel arrived, was there war or was there not, the same difficulty as was before pointed out would arise as to its shipment without passing through the enemy's custom-house, and possibly paying export duties to the hostile Government.

The learned Judge then concluded his judgment as follows :—

"We are of opinion that for a British subject (not domiciled in a neutral country, which the Defendant cannot be presumed to have been) to ship a cargo from an enemy's port even in a neutral vessel without licence is an act *primâ facie*, and under

all ordinary circumstances, of dealing and trading with the enemy, and therefore forbidden by law; that it lies on the person alleging it to be lawful in the particular instance to establish the circumstances which render it so, and that in the absence of proof that it was lawful neither a British subject nor an alien friend can found any action upon the fact of its not having been performed. The Sovereign of this country has the right to proclaim war, with all its consequences, enforcing or mitigating them either generally or in particular instances, as may be thought best by the Government. One of those consequences, not removed or dispensed with by any treaty, Order in Council, or licence, or by any special circumstances of necessity, is that trade and dealing with the enemy, unless expressly permitted, are forbidden. The plea alleges that the contract could have been fulfilled without such dealing and trade. That, as we have already shown, upon grounds not considered in the judgment of the Court of Queen's Bench, may be true. If it may, then, inasmuch as the law justifies what it commands, and effects that purpose in cases like the present, by dissolving contracts which presumably cannot be executed without dealing and trading with the enemy, the plea is sufficient. We, therefore, reverse the judgment of the Court below, and give judgment for the Defendant."

Note.—There was a replication to this plea, that by a certain Order in Council it was permitted to British subjects and neutrals to trade with Russian ports not blockaded; but as this order was not contemporaneous with the declaration of war, it was held by the Court of Queen's Bench, and the Court of Exchequer Chamber concurred, that it had no operation to prevent the alleged dissolution of the contract, and the contract once dissolved could not be redintegrated by it.

Observations.—With regard to the first of the principles laid down in *Esposito* v. *Bowden*, that trading with the enemy, except

with the licence of the Crown, is illegal, the question first came before a court of law in *Gist* v. *Mason and others.** In this case the Defendants were West Indian merchants and had property in the Islands captured by the French during the last war. They had employed neutral vessels to supply these islands with provisions, and they had caused these vessels to be underwritten. The action was to recover the premiums. The Defendants' counsel contended that these voyages were illegal, and that as both the parties were in *pari delicto*, the maxim of law, *melior est conditio defendentis* ought to prevail. But Lord Mansfield directed a verdict for the Plaintiffs. The Defendants moved for a new trial, but Lord Mansfield, C.J., laid it down—

"This upon the face of it is the case of a neutral vessel. It is nowhere laid down that policies on neutral property, though bound to an enemy's port, are void; and indeed I know no cases that prohibit even a subject trading with the enemy except two, one of which is a short note in Roll. Abr.,† where trading with Scotland, then in a general state of enmity with this kingdom, was held to be illegal; and the other a note (which is now burned) which was given to me by Lord Hardwicke, of a reference in King William's time to all the Judges whether it were a crime at the common law to carry corn to the enemy in time of war, who were of opinion that it was a misdemeanour.

"By the maritime law, trading with an enemy is cause of confiscation in a subject, provided he is taken in the act; but this does not extend to a neutral vessel."

This statement of Lord Mansfield, that the rule of maritime law does not apply to neutral vessels, was expressly contradicted by Sir W. Scott (Lord Stowell) in the case of *The Hoop.*‡ "And although there is a dictum of Lord Mansfield that it is nowhere laid down that policies on neutral vessels, though bound to an enemy's port, are void, in the case of *Bell* v. *Gibson*,§ yet that

* 1 T. R. 88.
† 2 Roll. Abr. 173.
‡ 1 Rob. 196.
§ 1 B. & P. 345.

case was afterwards overruled; and it was expressly laid down by Lord Kenyon in *Potts* v. *Bell*,* that all trading with an enemy is illegal, and that therefore the owner of goods in a neutral vessel, coming from an enemy's port, could not recover on a policy of insurance."

In the case of *The Hoop*,† certain merchants claimed goods purchased on their account in an enemy's country, and shipped on board a neutral vessel. The claim went on to allege that by certain Acts of Parliament they considered the importation of the goods was made legal, and that they were so advised by the law advisers of the Commissioners of Customs at Glasgow; and that no orders of Council were necessary; and that all the goods brought from the United Provinces would in future be entered without them; and that in consequence of such information they had caused the goods in question to be shipped at Rotterdam for their account, ostensibly documented for Bergen to avoid the enemy's cruisers. But Sir W. Scott, in his judgment, said :—

"It is said that these circumstances compose a case entitled to great indulgence; and I do not deny it. But if there is a rule of law on the subject binding the Court, I must follow where the rule leads me, though it may lead to consequences which I may privately regret when I look to the particular intention of the parties. In my opinion there exists a general rule in the maritime jurisprudence of this country by which all subjects trading with the public enemy, unless with the permission of the Sovereign, is interdicted. By the law and constitution of this country, the Sovereign alone has the power of declaring war and peace. He alone, therefore, who has the power of entirely removing the state of war, has the power of removing it in part by permitting where he sees proper that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an

* 8 T. R. 548. † 1 Rob. 196.

intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely and possibly on grounds of private advantage not very reconcileable with the interests of the State. It is for the State alone on more enlarged views of policy and on consideration of all circumstances that may be connected with such intercourse, to determine when it shall be permitted, and under what regulations."

Sir W. Scott then proceeds to point out that there is another reason recognised by the civilians, and that is, the total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. "In the law of almost every country the character of an alien enemy carries with it disability to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*. A state in which contracts cannot be enforced cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof than that the law imposes a legal inability to contract. To such transactions it gives no sanction. They have no legal existence, and the whole of such commerce is attempted without its protection and against its authority. Upon these and similar grounds it has been the established rule of the law of this Court, confirmed by the judgment of the Supreme Court, that trading with the enemy, except under a royal licence, subjects the property to confiscation."

Sir W. Scott then proceeded to point out the various cases in which the property of British subjects has been declared confiscated, some of them of great hardship,—to which the reader is referred;* and that the rule has always been rigidly enforced, as in the case where the Government has authorised, under the sanction of an Act of Parliament, a homeward trade from the

* *The Hoop*, 1 Rob. 196.

enemies' possessions, but had not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence. It has been enforced where strong claims not only of convenience but almost of necessity excused it on behalf of the individual; that it has been enforced where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities.

After pointing out that the rule has not only been enforced against subjects of the Crown, but likewise against those of its allies in the war, Sir W. Scott refers to the judgment of Lord Mansfield in *Gist* v. *Mason** in these words:—

"Indeed it is the less necessary to produce these cases, because it is expressly laid down by Lord Mansfield, as I understand him, that such is the maritime law of England; and he who for so long a time assisted at the decisions of that Court and at that period, could hardly have been ignorant of the rule of decision on this important subject; though none of the instances which I happen to possess prove him to have been personally present at those particular judgments."

He then proceeds to disallow any exception in favour of neutral vessels from the general rule† by saying:—

"What is meant by the addition, 'but this does not extend to a neutral vessel,' by Lord Mansfield,‡ it is extremely difficult to conjecture, because no man was more perfectly apprised, that the neutral bottom gives in no case any sort of protection to a cargo that is otherwise liable to confiscation, unless under the express stipulations of particular treaties; and, therefore, I cannot but conclude that the words of that great person must have been received with some slight degree of misapprehension."

The rule as thus laid down in the Admiralty Courts was afterwards declared by Lord Kenyon in *Potts* v. *Bell*,§ after

* 1 T. R. 88.

† *Gist* v. *Mason*, 1 T. R. 88.

‡ Vide, *supra*, p. 12.

§ 8 T. R. 548.

hearing not only common law counsel, but the argument of civilians, to be a principle of common law. Referring to the argument of Sir John Nicholl, the King's advocate, who quoted the cases referred to by Sir W. Scott in *The Hoop*, Lord Kenyon gave judgment :—

"That the reasons the King's advocate had urged and the authorities he had cited were so many and so uniform, and so conclusive to them that a British subject trading with an enemy was illegal, that the question might be considered as finally at rest; that these authorities, it was true, were mostly drawn from the decisions of the Admiralty Courts ; and that after all the diligence which had been used, there was only one direct authority* on the subject to be found in the common law works, and that one was to the same effect; but the circumstance of there being that single case only was strong to show that the point had not been since disputed, and that it might now be taken for granted that it was a principle of common law that trading with an enemy without the King's licence was illegal in British subjects."

It would appear by the case of *The Bella Giudita*† that cargo shipped to a place in the temporary occupation of an enemy is liable to confiscation. In the case of *The Nellie Perrie*,‡ a case of a British subject trading with Holland without licence, an exception was taken to the form of the condemnation, and it was contended that it was nowhere laid down that the individual was entitled to the benefit of such a seizure. But the Court held that "the same course of decisions which has established that property of a British subject taken trading with the enemy is forfeited has decided also that it is forfeited as a prize. The ground of the forfeiture is, that it is taken adhering to the enemy, and therefore the proprietor is *pro hâc vice* to be considered as an enemy."

* Vide *Gist* v. *Mason*, 1 T. R. 88.

† Lords, 20th July, 1785.

‡ 1 Rob. 219 (note).

The second principle of law laid down in *Esposito* v. *Bowden*, "That it is illegal for a subject in time of war without licence to bring from an enemy's port, even in a neutral ship, goods purchased in the enemy's country after the commencement of hostilities, though not appearing to have been purchased from an enemy in effect, that trading with an enemy's country is trading with the enemy," should be, it is suggested, read with the further statement of the learned Judge,* that there is very high authority for saying that the removal of merchandise, even though acquired before the war, from the enemy's country, after knowledge of the war, without a royal licence, is generally illegal.

Previously acquired Property.—The weight of the authorities makes no distinction between the cases of goods purchased before hostilities and goods purchased after, but declares the bringing away of both from an enemy's country without a licence to be illegal. In the case of *The Juffrou Catherina,*† Lord Stowell directed certain lace that had been ordered to be sent over before war broke out, and which there had been no opportunity of countermanding, and which had been put on board under an erroneous conception that it was guarded by a licence for raw material, to be restored, at the same time saying:—

"Here the dominion was in the enemy's shipper, under a discretion reposed in him by orders before the war, and which the importer is not shown to have had any opportunity of countermanding. I wish it to be understood by this decree the necessity of obtaining a licence is not in any degree relaxed. On the contrary, this Court cannot sufficiently inculcate the duty of applying in all cases for the protection of a licence where property is to be withdrawn from the country of the enemy. It is, indeed, the only safe way in which the parties can proceed. Without meaning in the least to weaken the force of this obligation, I think the claim, under the particular circumstances of this case, is fully entitled to the favourable

* 7 E. & B. 785. † 5 Rob. 140.

considerations which I have thrown out, and I shall direct this property to be restored."

In this case Lord Stowell relieved the owner of the property, not because it was ordered and purchased before the war, though the fact went to the merits of the case, but because the lace had been shipped by the enemy's shipper in obedience to orders which there was no opportunity of countermanding, especially pointing out that in this as in all other cases it was necessary to obtain the protection of a licence where property is to be withdrawn from an enemy's country.* And the same principles were applied by the American courts of justice† to the intercourse of their citizens with the enemy on the breaking out of the late war between the United States and Great Britain. A case occurred in which a citizen had purchased a quantity of goods within the British territory *a long time previous to the declaration of hostilities*, and had deposited them on an island near the frontier. Upon the breaking out of hostilities his agents had hired a vessel to proceed to the place of deposit and bring away the goods. On her return she was captured, and, with the cargo, condemned as prize of war. It was contended for the claimant that this was not a trading within the meaning of the cases cited to support the condemnation; *that on the breaking out of war every citizen had a right, and it was the interest of the community to permit its members to withdraw property purchased before the war, and lying in the enemy's country.*‡ But the Supreme Court determined that whatever relaxation of the strict rights of war the more mitigated and mild practice of modern times might have established, there had been none on this subject. The universal sense of nations had acknowledged the demoralising effects

* See the case of *The Madonna della Gracie*, 4 Rob. 195.

† *The Rapid*, 8 Cranch, 155; Wheaton's Int. Law., by Dana, 8th ed. p. 396.

‡ See Halleck's International Law in support of this view, but he admits the necessity of procuring a licence. See also the suggestion of Campbell, C. J., in *Esposito* v. *Bowden*, 4 E. & B. 963, *infra*, p. 20.

which would result from the admission of individual intercourse between the States at war. The whole nation is embarked in one common bottom, and must be reconciled to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because he is the enemy of his country. This being the duty of the citizen, what is the consequence of a breach of that duty? The law of prize is a part of the law of nations. By it a hostile character is attached to trade independent of the character of the trader who pursues or directs it. Condemnation to the captor is equally the fate of the enemy's property, and of that found in an anti-neutral trade. A citizen or an ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks. * * *

* * * * * * *

Whether the trading in that case was such as in the eyes of the prize law subjects the property to capture and confiscation, depended on the legal force of the term. If by trading, in the law of prize, were meant that signification of the term which consists in negociation or contract, the case would certainly not come under the penalty of the rule. *But the object, policy, and spirit of the rule are intended to cut off all communication, or actual locomotive intercourse, between individuals of the States at war. Intercourse inconsistent with actual hostility* is the offence against which the rule is directed, and by substituting this term for that of trading with the enemy, an answer was given to the argument that this was not a trading within the meaning of the cases cited. Whether, on the breaking out of war, a citizen has a right to remove to his own country with his property or not, the claimant certainly had not a right to leave his own country for the purpose of bringing home his property from an enemy's country. As to the claim for the vessel, it was held to be founded upon no pretext whatever, for the undertaking was altogether voluntary and inexcusable.

So in the case of *The St. Lawrence,** where the goods were purchased before the war, but not shipped until nearly a year after the declaration of hostilities, they were pronounced liable to confiscation. Supposing a citizen had a right, on the breaking out of hostilities, to withdraw from the enemy's country his property purchased before the war, on which the Court gave no opinion, such right must be exercised with due diligence, and within a reasonable time after a knowledge of hostilities. To admit a citizen to withdraw property from a hostile country a long time after the commencement of war, upon the pretext of its having been purchased before the war, would lead to the most injurious consequences, and hold out temptations to every species of fraudulent and illegal traffic with the enemy. To such an unlimited extent, the right could not exist.

In *Esposito* v. *Bowden* it was rather admitted that a citizen has a right to remove from an enemy's country, with his previously acquired property, provided he does so at the outbreak of hostilities; it was, in fact, on this view that the judgment in the Queen's Bench † was given. Lord Campbell, C.J., said:—

"Even after the arrival of the ship and the declaration of war, there was a possibility that the defendant's factors, without any breach of allegiance to the Crown of England, might have furnished the cargo of corn, the property of English subjects at Odessa, or the property of allies of the Crown of England, *which it might have been meritorious to save from the grasp of the enemy.* It certainly would have been as unlawful to trade with neutrals domiciled at Odessa for the purpose of commerce, as with native-born Russians. But we conceive there would have been no illegality in contracts by the defendant's factors for obtaining a cargo for this ship from corn, the property of English or French subjects about to leave England on account of the war."

* 8 Cranch, 434; 9 Ibid. 120. † 4 Ell. & Bl. 977.

But Willes, J., in his judgment in *Exposito* v. *Bowden*,* in Error, throws doubt on this.

"Moreover, it is not correct to say † that the charterer, even if he could have succeeded in lawfully acquiring the goods, could have lawfully shipped them, if doing so involved dealing or trading with the enemy. It is more than likely that the cargo could not have been put on board without passing through the enemy's Custom-house, and paying export dues. The passing it through the Custom-house and obtaining a Russian permit for its shipment, might have been but a slight case; still it would have been a case of dealing with the enemy. The payment of export dues would have supplied him doubly with the means of carrying on the war * * * * It is clear ‡ that the charterer could maintain no action against the shipowner for refusing to take on board a cargo which the charterer could load only by dealing and trading with the enemy; and, on the other hand, neither ought the shipowner to maintain an action against the charterer for not doing so."

However hard the rule of war may seem, the citizen plainly can relieve himself, if it presses too hardly in his own particular case, by obtaining a *licence from the Crown*. Mr. Wheaton says,§ "we have seen, what is the rule of public and municipal law on this subject, and what are the sanctions by which it is guided. Various attempts have been made to evade its operations and to escape its penalties, but its inflexible rigour has defeated all these attempts. The apparent exceptions to the rule, far from weakening its force, confirm and strengthen it. They all resolve themselves into cases where the trading was with a neutral, or the circumstances were considered as implying a licence, or the trading was not consummated until the enemy had ceased to be such. In all other cases, an express licence

* 9 E. & B. 763. † Ibid. p. 788. ‡ Ibid. p. 791.

§ Wheaton's Int. Law, p. 400, 8th ed., by Dana; Kent, Int. Law; Halleck's Int. Law.

from the Crown is held to be necessary to legalise commercial intercourse with the enemy."

Mr. Dana, in a note to his edition of Wheaton's International Law,* thus states the reason why this rule should be preserved in all its inflexibility:—

"The truth is, the most humane, and often the most efficient part of war is that which consists in stopping the commerce, and cutting off the material resources of the enemy. If cutting off our commerce with him, and his with us, cripples and embarrasses him, it must be done. Driving his general commerce from the sea, and blocking his ports to keep neutral commerce from him, must diminish his resources, and tend to coerce him. It is the least objectionable part of warfare. It takes no lives, sheds no blood, imperils no households; has its field on the ocean, which is a common highway, and deals only with persons and property voluntarily embarked in the chances of war for the purpose of gain, and with the protection of insurance. War is not a game of strength between armies or fleets, nor a competition to kill the most men and sink the most vessels; but a grand, valiant appeal to force to secure an object deemed essential, when every other appeal has failed. The purpose of using force is to coerce your enemy to the act of justice assumed to be necessary."

The second proposition contained in the second principle laid down by Willes, J., that trading with the inhabitants of an enemy's country is trading with the enemy, it is not necessary to dwell upon. In the authorities cited, then, the mere removal of property from an enemy's country is illegal, whether the property is bought from an enemy, neutral, or fellow-subject domiciled in the enemy's country, or is the property of the remitter himself. The penalty is *in rem*, not *in personam*. The goods are confiscated.

Domicil.—But it is important to decide, whether the party

* p. 876.

alleged to be in fault is a citizen of the country claiming to confiscate his goods. And the general rule is, that every person is to be considered as belonging to the country in which he has his domicile, whatever may be his native or adopted country; and that all trade is prohibited with the enemy to all persons, whether natives, naturalised citizens, or foreigners domiciled in the country, during the time of their residence, under the penalty of confiscation.

Recapitulation.—By the declaration of war, therefore, all trading with the enemy's country is interdicted to all the subjects of the State at war, as well as to the allies of that State, without the licence of the Government. That where either cargoes or ships are taken so trading, they are liable to be confiscated in the Admiralty Court, as prizes to their captors. That the Courts of Common Law have, in this country, recognised and followed the rule of maritime law as thus laid down in the Admiralty Courts, and have declared that, such trading with the enemy's country being illegal, and rendering the property of the parties transgressing liable to confiscation, all contracts arising out of such trading are illegal; and, therefore, all assistance is refused to either side seeking to enforce such contracts. This being the state of law in this country, in order to apply it to a particular contract of affreightment, it is necessary to inquire :—

1st. Whether the contract was one of trading.

2nd. Whether it was with the enemy's country.

3rd. Whether the owner of the ship or cargo is a subject of the State then at war, or its allies.

1st. *Whether the Contract was one of Trading.*—In the case of *The Rapid*,* as we have seen, the law, as laid down in the American Courts,† is, that the offence against which the rule of law is directed is not merely trading with the enemy, but any intercourse inconsistent with actual hostility; and that a citizen

* 8 Cranch, 155. † See *The Mary*, 1 Gallison, 620.

had no right to leave his own country for the purpose of bringing home goods purchased before the commencement of war. And Lord Stowell, in the English Courts, in the case of *The Hoop*,* laid it down that merchants were not justified in bringing their goods home from an enemy's country if any time had elapsed; but, in the case of *The Madonna della Gracie*,† Lord Stowell drew a distinction where the goods had not been purchased in the way of trade; and held that, although the property was not brought away until three years had elapsed, yet, as there had been no opportunity of doing so before, the intermediate time might be considered as annihilated. This decision is entirely opposed to the case of *The Rapid* in the American Courts; but if we come to qualify it by the principle laid down by Mr. Justice Willes in *Esposito* v. *Bowden*,‡ that mere payment of export and custom-house dues are sufficiently dealing with the enemy so as to render the contract illegal, the English rule of law cannot be said to be more lenient, or to differ much from that of the American —that is to say, all intercourse with the enemy, inconsistent with actual hostility, is illegal. The question then becomes, how is an English resident in a foreign country to remove himself and property, on the outbreak of hostilities, when the mere payment of the ordinary export and custom dues renders any contract he may make for sea transport illegal? If such a case should ever come before the English courts of law, the question would be raised, Whether, as such payment was *ex necessitate*, and not *ex voluntate*, it could be fairly considered as dealing with the enemy, and rather should be looked upon as a fine or ransom for the right to remove, than a voluntary contribution to the enemy? And, even if this were not so, the maxim that *de minimis non curat lex* would surely here have operation.

But in all cases where there is doubt, the shipper cannot do

* 1 Rob. 196. † 4 Rob. 195.

‡ 9 E. & B. 788.

better than attend to the advice Sir C. Robinson, in his note to *The Ocean*,* gives:—

"The situation of British subjects wishing to remove from the country of the enemy on the event of a war, but prevented by the sudden interruption of hostilities from taking measures for removing sufficiently early to enable them to obtain restitution, forms not unfrequently a case of considerable hardship in the Prize Courts. In such cases it would be advisable for persons so situated, on their actual removal to make application to Government for a special pass, rather than to hazard valuable property to the effect of a mere previous intention to remove, dubious as that intention may frequently appear under the circumstances that prevented its being carried into execution."

With the exception, therefore, of the as yet undecided case of a subject removing his property on the outbreak of war, the rule of English law is, that all intercourse with the enemy's country, unless with the licence of the Crown, is illegal.

It has been decided in several cases, both in the English and American Courts, that if any portion of the voyage is to an enemy's port, the whole voyage is illegal.†

2. *Whether the Trade is with the Enemy's Country.*—The definition of what is an enemy's country is thus laid down by the American authorities in a case arising out of the late war:‡—

"Enemy's territory is a place or region which is under the actual control of the enemy, and of which he has firm possession, without reference to the political or legal relations of the territory to the general government, or to what sovereign the territory which the enemy is holding belongs in time of peace. The Prize Courts only looked to the fact that the region was in the possession and control of a power capable of carrying on hostilities against the United States, and of compelling their

* 5 Rob. 91. † *The Alexander*, 7 Cranch, 169—179.
‡ Wheaton's Int. Law, by Dana, 8th ed. p. 375 (*n*).

government to meet them by the exercise of belligerent rights.* And the general doctrine that in a civil war actual and firm possession, and not the right or merits of the parties to the war, determines the character of the place for the time being, so far as the commercial relations of neutrals are concerned, was also asserted by the United States in its diplomatic relations with Peru."

The English Courts have laid down a similar interpretation of the enemy's country. In the old wars, at the beginning of this century, many of the West Indian Islands changed hands. But although they were still practically English, and their plantations were in the hands of Englishmen, and were mortgaged to and liable to pay interest to English capitalists, all trading with them as long as they remained in the hands of the French rendered the ship and cargo liable to confiscation.

The printed papers of appeal in one case† contain the following strong representation of the rule as applied to the circumstances of this case: ‡—"The Appellants and intervener, in support of their case, beg leave to observe that as the facts stand now disclosed to your Lordships, the simple question arises, *whether it was so* unlawful for a British subject to send supplies to the British plantations in the Granada Islands whilst under the misfortune of a temporary subjection to the French as that a confiscation of the supplies so sent should be the just and legal consequence of his misconduct." The Lords affirmed the judgment of the Vice Admiralty Court of Appeal.

Mr. Dana, in his edition of Wheaton's International Law, says: §—

"The general doctrine may be stated thus: Firm possession

* Wheaton's Int. Law, by Dana, 8th ed., p. 418 (*n*).

† *Bella Giudita*, Lords, 20th July, 1785, quoted in *The Hoop*, 1 Rob. 196.

† *The Vrow Anna Catherina*, 5 Rob. 167.

§ 8th ed. p. 421.

by the enemy in war suspends the power and right to exercise sovereignty over the occupied place, and gives the enemy certain rights over it of a temporary character, which all nations recognise, and to which loyal citizens must submit. It is for the time, in the sense of the laws of war, enemy's territory, and is to be treated as such in almost all supposable cases of *belligerent or neutral rights and duties.*"—(*United States* v. *Rice*, Wheaton's Rep. iv. 246; *Thirty Hogsheads of Sugar*, Cranch, ix. 191; *Fleming* v. *Page*, Howard ix. 603; *Cross* v. *Harrison*, Howard xvi. 164). It was upon this principle that the Courts of the United States, during the civil war, were able to treat portions of the United States as enemy's territory, for the time being, in the technical sense of the laws of war, and the property of persons residing in it, captured at sea, as enemy's property, without touching the question of the general political status of such places and their inhabitants.

Where, however, the country to which the ship is bound ceases to be hostile before she is captured, then the voyage is not illegal, because there is no illegal act.*

3. *Whether the Owner of a Ship or Cargo is a Subject of the State at war, or of her Allies?*

The general rule is, the national character is determined by the residence of the owner,† independent of the country of which he may be a native; so that to one merely residing in a State that is at war, all trading is prohibited. And this rule is one that has its basis in common fairness and public policy, for it would be manifestly unjust in a State to exclude its own citizens from trading with a particular country, and thus shut them out from profit and employment, whilst at the same time it allowed a stranger residing on its shores to reap the enormous advantage he would from exclusive trade; and also it is clearly against the public policy of a State which is forced by the stern necessities of

* 5 Rob. 251. † *The Vigilantia*, 1 Rob. 1.

war to cut off all intercourse between its own subjects and a foreign power, to permit such intercourse to one who is not an actual member of the country, yet enjoys and claims to enjoy the protection of its laws, not only for his person, but for that very commerce which is against the policy of the country that protects him.*

This general rule is, however, liable to be enlarged, as well as restricted in certain cases, and though, as Mr. Wheaton says,† the text writers are deficient in definitions and details as to what constitutes a domicil, yet the defects are supplied by the precedents furnished in the British prize courts. The subject is without doubt a large one, and little more can be done here than to point out the more general principles as laid down by Lord Stowell.

Time.—The first exception to the general rule is that a mere visit of a neutral does not constitute a domicil, and the question what is a visit and what residence depends on time. In a case mentioned by Mr. Wheaton,‡ Lord Camden is reported to have stated, if a man went into a foreign country upon a visit, to travel for health, to settle a particular business, or the like, he thought it would be hard to seize upon his goods, but a residence not attended by these circumstances ought to be considered as a permanent residence. Speaking of the resident foreigners in St. Eustatius, he said in every point of view they ought to be considered resident subjects. Their persons, their lives, their industry were employed for the benefit of the State under whose protection they lived; and if war broke out they continued to reside there, paid their proportion of taxes, imposts, and the like equally with natural born subjects, and no doubt came within that description. In the case of *The Harmony*,§

* *The Indian Chief*, 3 Rob. 33.
† Inter. Law, by Dana, 8th ed. p. 405.
‡ Ibid. p. 405.
§ 2 Rob. Ad. Rp. 324.

an American partner of a house in America personally resident in France, with which nation England was then at war, Lord Stowell decided that he had acquired a French character by the *length* of his residence in France. "Of the few principles that can be laid down generally, I may venture to hold that time is the grand ingredient in constituting domicil. It is not unfrequently said that if a person comes only for a special purpose *that* shall not fix a domicil. This is not to be taken in an unqualified latitude and without some respect had to the time which such a purpose would occupy. A special purpose may lead a man to a country where it shall detain him the whole of his life. A man comes here to follow a lawsuit; it may happen that it may last as long as himself. I cannot but think that against such a long residence the plea of an original special purpose could not be averred. Suppose a man comes into a belligerent country at or before the beginning of a war, it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself, but if he continues to reside during a good part of the war, contributing by payment of taxes and other means to the strength of that country, I am of opinion that he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original, and sole purposes of a long continued residence. There is a time which will estop such a plea. No rule can fix the time *à priori; but such a time there must be.*"

Eastern Factories.—Another exception to the general rule, that residence constitutes domicil, is, the case of merchants residing in the East, who are not to be considered as citizens of the country in which they reside, but of the factories under whose protection they carry on their trade. The explanation of this rule may be one of three—either that the decayed

nations of the East, possessing little or no mercantile navy, are not recognised by the maritime law, and cannot, therefore, protect those associations of foreign merchants who occupy their shores; or because the merchants cannot be said to have acquired a domicil, only settling for the mere purpose of trade; or if they have so acquired, the law presumes that they have always the *animus revertendi.* In the case of *The Indian Chief,** Lord Stowell thus lays down the law :—

"It is a rule of the law of nations applying peculiarly to those countries, and is different from what prevails ordinarily in Europe and the western parts of the world, in which men take their present national character from the general character of the country in which they are resident; and this distinction arises from the nature and habits of those countries. In the western parts of the world alien merchants mix in the society of the natives; access and intermixture are permitted, and they become incorporated to almost the fullest extent; but in the East from the oldest times an immiscible character has been kept up. Foreigners are not admitted into the general body and mass of the society of the nation. They continue strangers and sojourners, as all their fathers were—*Doris amara suam non intermiscuit undam*—not acquiring any national character under the general sovereignty of the country, and not trading under any recognised authority of their original country, they have been held to derive their present character from that of the association or factory under whose protection they live and carry on their trade." Lord Stowell then proceeds to point out instances where a Mr. Nemeaux, though born at Smyrna, and carrying on trade there, was considered a Dutchman, as he traded under the protection of the Dutch consul. So a Jew living in a Dutch establishment on the coast of Malabar was held a Dutchman, and not a subject of the Rajah of that place; and so a M. Constant de Rubecque, a Swiss by birth, having

* 3 Rob. 29.

traded in a French factory in China, fortunately had quitted it before capture. In the case then before him, which was that of an American merchant residing at Calcutta, who attempted to set up that he was a subject of the Great Mogul, Lord Stowell laid down not only that he must be taken as an English subject, as he was protected by the English factory at that place, but also that the English rule was not a mere *imperium in imperio*, as in the ordinary case of eastern factories; but that Great Britain exercised the power of declaring here war and peace, which is among the strongest marks of actual sovereignty, and merchants residing there are to be considered British merchants. This rule was recognised by the municipal law of England in *Evans* v. *Hutton*,* where it was laid down that a contract to deliver goods to the agent of a shipper at Canton was not one which would be dissolved by the breaking out of war between England and China.

Diplomatic Officers.—Another exception to the general rule is that ambassadors and other diplomatic officers do not by mere residence in a country become domiciled, this being a part of the law of nations. With regard to the higher officers, Vattel lays it down† that where a public minister engages in trade his personal goods may be attached to compel him to answer a suit, and so Bynkershoek says,‡ where the minister assumes on himself the character of a merchant, in such case the goods possessed by him may be attached to compel him to defend a suit, and instances corn, wine, oil in his warehouse for trade, or horses and mules kept for the purposes of breeding and selling. According to these authorities, a public minister, *qua* trader, is amenable to the municipal law of the country in which he resides: and hence, were he to enter into trade with the enemy of the country to whose Court he was accredited, it seems clear

* 4 M. & G. 954.

† Vattel, Droit des Gens, lib. iv. ch. 9, § 114.

‡ Bynkershoek De Foro Legatorum, c. 9, §§ 9, 10.

from the law of nations that such a trade would be illegal, and render his ship or cargo liable to confiscation. Modern civilisation, however, clothes ministers with such dignity, that, as Mr. Dana says in a note*:—

"As to cases of property engaged in trade or held on private trust, one rule of conduct ought to be laid down. The diplomatic officer should not engage either in trade, or in the execution of unofficial work which may involve litigation. If his so doing is regarded by international law as a waiver of his privilege, it may be a derogation of the rights of his own sovereign, whose privilege it is he undertakes to waive. If it is not so regarded, it may operate unfairly upon other parties." And were an ambassador to trade with the enemy, the consequences at least would be that he would be recalled for the breach of diplomatic etiquette. But with the case of consuls and other commercial agents it is different.† In the first place, they are not considered public ministers, and they often combine the office of merchant with that of consul. In the case of *The Indian Chief*,‡ Lord Stowell laid it down that the character of consul does not protect that of merchant united in the same person, and was so decided in the case of the Portuguese consul in Holland, and in the case of a Russian consul at Flushing ;§ and these cases were again brought forward in the case of Mr. Fenwick, American consul at Bordeaux. And in his case, as in all others, it was laid down, the moment that he engaged in trade his official character did not protect his mercantile. The whole of that question is as much shut up and concluded as any question of law can be."‖

It follows, as a corollary to the above rule, that the residence

* Wheaton's Int. Law, by Dana, 8th ed., p. 307.

† Ibid. p. 296.

‡ 3 Rob. 26.

§ *Concordia*, Lords, Feb. 5th, 1782 ; *The Helt Huys Brandeburg*, Lords, July 16, 1784 ; *Pigou*, Lords, July 18, 1797.

‖ *The Josephine*, 4 Rob. 25.

of a person does, subject to the exceptions referred to, constitute his domicil; that a citizen of a State at war is not precluded from trading with the enemy, provided he is domiciled in a neutral country. This is distinctly recognised by Mr. Justice Willes in his judgment in *Esposito* v. *Bowden*,* and is acknowledged by Lord Stowell,—who, however, points out that a British subject, though domiciled in a neutral country, cannot "trade with the enemy in contraband articles, such a trade being a breach of the allegiance that a citizen cannot put off."

But although the national character of a person as a citizen, neutral, or enemy may be thus in general determined by the place in which he resides, his property may acquire a hostile character, independent of national character derived from personal residence; for if he enters into a house of trade in another country he cannot protect himself by mere residence in a neutral country;† and in the same way the share of a partner residing in one of the States at war, trading with the enemy, is forfeited, although the actual house of business may be in a neutral country. See the decision in the American courts.‡

The result of the decisions seems to be to establish the following principles of law:—

Residence determines domicil:

except where of a mere temporary nature, the question then becoming one of time;

or where the residence is in the East for trade;

or where the residence is for the purposes of legation, provided that the person residing does not trade: if he does, in the case of a consul, *qua* the trading, his domicil is where he resides: in the case of a public minister it remains doubtful.

* 7 E. & B. p. 793, vide *supra*.

† *The Vigilantia*, 1 Rob. 1; *The Susa*, 2 Rob. 252; *The Portland*, 3 Rob. 41; *The Jonge Klassina*, 5 Rob. 300; *The Antonia Johanna*, 1 Wheaton, 159; *The Friendschaft*, 4 Wheaton, 105.

‡ *The Venus*, 8 Cranch, 253.

That a house of business, domiciled in one of two hostile States, is not protected by the neutral residence of its partners.

That the share of a partner domiciled in one of two hostile States is not protected, though the house of business is in a neutral country.

Loss of Domicil.—But although a national character, independent of birth, may be stamped on a person by mere residence, the native character easily reverts; where there is sufficient evidence of the *animus revertendi*, the person loses his domicil, though he has not quitted the country, and may be unable to do so. The case of *The Indian Chief** is an example of the nature of domicil in general. In this case the ship and cargo were both seized as prize. "The ship was claimed by a Mr. Johnson, who had after the declaration of American independence claimed to be American, and as such had been adopted by that Government. He came to this country in 1783, and engaged in trade, and resided till 1797, "during which time he was undoubtedly domiciled as an English trader, for no position is more established than this, that if a person goes into another country and engages in trade, and resides there, he is by the law of nations to be considered as a merchant of that country." † It appeared, however, that Johnson had removed from the country, which he would have done earlier had he not been detained by creditors. Speaking of the effect of this, Lord Stowell said:—

"Taking it to be clear that the national character of Mr. Johnson as a British merchant was founded on residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held that from the moment he turns his back on the country where he has resided on his way to his own country he was in the act of resuming his original character, and is to be considered as an American. The character that is gained by residence ceases by residence. It is an adventitious

* 3 Rob. 22. † *Per* Lord Stowell.

character, which no longer adheres to him from the moment that he puts himself in motion *bonâ fide* to quit the country. *Sine animo revertendi.** I shall restore the ship."

The cargo was claimed by a Mr. Millar, the American Consul at Calcutta. Lord Stowell determined that he was, as a merchant, not protected by his character of Consul; that as a merchant residing at an English factory in the East, situate in a portion of the English empire, he must be taken as an English merchant found trading with the enemy, and therefore the cargo was condemned.

Trade peculiarly belligerent.—We have seen how both the municipal as well as the maritime laws of England and of other countries prohibit all intercourse with an enemy's territory from the commencement of hostilities, without a special licence from the Government, and that this interdiction depends on the domicil of the owner of the ship or cargo. In the wars, however, that existed at the end of the last century and the commencement of this, the decisions of the English Prize Courts went still further, as Sir C. Robinson says.†

"Owing to the long continuance of the late war, and the success of the British arms in all the operations that were directed against the colonial possessions of the enemy, the cases depending on the interposition of neutral merchants in the colonial trade have been beyond example numerous and particular in their kind." It appears that everywhere the British maritime force was supreme, and all trade between her enemies and their colonies was suppressed; but the law of nations still permitted neutral vessels to trade to the enemy's ports; and the countries at war with England, finding the lion's skin deficient, attempted

* As to question what is sufficient evidence of the *animus revertendi*, see Story on Conflict of Laws; *The Indian Chief*, 3 Rob. 22; *The Diana*, 5 Rob. 60; *La Virginie*, 5 Rob. 98; and in the American Courts, *The Venus*, 8 Cranch, 277; Wheaton's Int. Law., &c. For the law of France, which is similar to that of England, *Codes des Prises*, tom. 1, pp. 92, 139, 303.

† 4 Rob., Appendix A.

to eke it out with the fox's, encouraging neutral merchants to carry on that trade that was denied to themselves. The system that formerly prevailed among the nations of Europe was to hold their colonies incommunicable—that is to say, that none but vessels of the parent State were permitted to trade with the colonies, so that the whole trade to and from the colonies in the time of peace was monopolised by the parent State. Owing to the success of the naval power of England this trade between France, Spain, and Holland with their respective colonies was interrupted, and those countries then attempted to carry on the colonial commerce by particular permission to neutrals to carry on the trade. This England refused to permit, on the grounds as thus stated by Sir C. Robinson:*—"The general rule that neutrals cannot legally trade to the colonies of belligerents is indeed deducible from the most clear and admitted principles of the law of nations—a belligerent has a right so far as his enemy only is concerned to distress and even annihilate the commerce of the enemy. *That right is restricted by another belonging to neutral nations, viz., the right to carry on their accustomed trade.* But the colonial trade being a branch of commerce from which neutrals are excluded in time of peace, they can suffer no injury by not being allowed to engage in it during hostilities. On the contrary, it is their known duty to abstain from such a trade; inasmuch as it is an obvious and undoubted principle of general law *that neutrals are not to interpose in war, so as to afford to one enemy a manifest aid or relief from the pressure of his adversary, 'hostem hosti imminenti eripere.'* This is an admitted principle in respect to its intrinsic fitness and propriety; whatever difference of opinion may sometimes arise as to the particular circumstances which are necessary to warrant the application of it."

Although the more modern policy of commercial Europe has been to remove the restrictions on commerce, and to advocate

* 4 Rob., App. A., p. 7.

the principles of free-trade and removal of protection, so that the particular argument against the interference of neutrals for the purpose of carrying on a protected trade has ceased to have any application, yet the general principle laid down shows the spirit with which a successful maritime power will look upon neutrals attempting to carry on the trade of the enemy. The following case of *The Vigilantia*,* decided by Lord Stowell, contains a clear illustration of this.

The rule, as admitted to be generally true by Lord Stowell, is, that the domicil of the proprietor constitutes the national character of the vessel; but this, as he shows in the case of *The Vigilantia*, is liable to qualification. In this case the Dutch, who were at war with England, and had been overpowered on the seas, attempted to protect their fisheries by transferring to neutral merchants the property in their vessels. Lord Stowell thus remarks upon the case :—

"In my apprehension, unless it could be maintained as a rule, *without any exception whatever*, that the domicil of the proprietor constitutes the national character of the vessel, this ship must be condemned, even if she had been really transferred. Now, on this point I conceive the rule to be, that where there is nothing *particular or special in the conduct of the vessel* itself, the national character is determined by the residence of the owner; but there may be circumstances arising from that conduct which will lead to a contrary conclusion * * * Suppose the naval arms of France had been triumphant in her present contest with Great Britain, and that all the British Greenland ships could no longer have been navigated as such from British ports; suppose a neutral country should offer her charitable assistance, and her merchants should say, 'We will purchase your vessels, but they shall still navigate to Greenland; they shall still continue under your management, and be fitted out in your ports; they shall still contribute to the industry of

* 1 Rob. 1.

your artificers; they shall be conducted by the skill of your navigators, by the attention of your merchants; and they shall supply your manufactures and revenues,' in my apprehension, the enemy would be justified in saying, 'You, the neutrals, are in this transaction mere merchants of Great Britain, your traffic is the traffic of Englishmen; with respect to this commerce, it has all the marks of English commerce upon it, and as English commerce it shall be considered and treated by us.'"

Lord Stowell then, remarking upon two cases decided in the House of Lords,* where the property of enemies domiciled in a neutral country had been restored to them, proceeded to point out the difference between them and the case of *Coopman*,† which had been decided on very different principles, "in which it was expressly laid down, that if a person entered into a house of trade in the enemy's country in time of war, or continued that connexion during the war, he should not protect himself by a mere residence in a neutral country. That decision instructs me in this doctrine, a doctrine supported by strong principles of equity and propriety,—*That there is a traffic which stamps a national character on the individual, independent of that character which mere personal residence may give.*"

In the case of *The Embden*,‡ in which the facts were somewhat similar, though sought to be distinguished, Lord Stowell gave a similar judgment. These sentences were affirmed on appeal before the Lords Commissioners of Appeal in Prize Causes, Feb. 10, 1800.

And in the case of *The Odin*,§ a British ship ostensibly transferred to a neutral, taken trading with the enemy, Lord Stowell, being satisfied that the transfer was merely nominal—a mere shifting of name, and nothing else—all substantial interests remaining the same, the ship was condemned, with her cargo.

* 1 Rob. 14.
† Lords, April 9th, 1798.
‡ 1 Rob. 16.
§ 1 Rob. 248.

Allies Trading with Enemy.—With regard to the subject of an allied power trading with the enemy, Lord Stowell, in the case of *The Nayade,** said, "it is not only illegal, but renders the ship and cargo liable to condemnation in the Prize Courts of the captor." In the case of Mr. A., a Dutch merchant, it was contended that the English Courts had no right to inflict forfeiture on a subject of Holland;—but it was replied, that it was no particular law of this country that inflicted such a penalty, but that it was an universal principle of the law of nations; and that it would place this country in a very disadvantageous situation indeed, if the subjects of an ally in war might trade with the enemy, while the property of British subjects so employed was subject to confiscation. Lord Stowell then adverts to the case of the German States, who, as free cities, it appears, are permitted to trade with the enemies of the empire.†

SECT. 2—LICENCES.

Absolutely necessary.—A licence is therefore absolutely necessary from the Government to legalise trade with an enemy's territory. And it has been clearly laid down, that where a licence is necessary, the owner of the ship or cargo cannot, where he has traded without a licence, shelter himself behind the opinion of another. In the case of *The Hoop,*‡ it appeared that the claimants applied to the Commissioners of Customs at Glasgow, to know what they considered to be the interpretation of certain acts, and whether the licence of the Crown was still necessary; and in answer to such application the merchants were informed, under the opinion of the law advisers of the said

* 4 Rob. 251. † *The Hoop*, 1 Rob. 217.

‡ 1 Rob. 196, vide *supra*, p. 13.

Commissioners, that no such orders of council were necessary; and that in consequence of such information they caused the goods to be shipped without a licence. Lord Stowell admitted the hardship, but condemned the goods.*

So in the case of *The Joseph*,† decided in the American Courts, the master declared that the voyage he took was countenanced by the opinion of the United States' Minister, that by undertaking such a voyage he would violate no law of his own country; but it was held that, though it might form a case of peculiar hardship, yet afforded no legal excuse which it was competent for the Court to admit as the basis of its decision.

Authority to grant.—The Sovereign alone has authority to grant licences. In *The Hoop*, Lord Stowell said: "By the law and constitution of this country, the Sovereign alone has the power of declaring war and peace. He alone, therefore, who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, when he sees proper, that commercial intercourse, which is a partial suspension of the war." And in the case of *The Hope*,‡ that Judge lays down still further the law on this point. "The instrument of protection, in order to be effectual, must come from those who have a competent authority to grant it. But these papers come from persons who are invested with no such authority.§ To exempt the property of enemies from the effect of hostilities is a very high act of sovereign authority. If at any time it is delegated to persons in a subordinate situation, it must be exercised either by those who have a special commission granted to them for the particular business, or by persons in whom such

* Vide *supra*, p. 13.

† *The Joseph*, 8 Cranch, 451, 455.

‡ 1 Dodson, 226.

§ The licence was granted by the British Consul at New York, and acquiesced in by the British Admiral on the American Station.

a power is vested in virtue of any official situation to which it may be considered incidental. *It is quite clear that no consul in any country, particularly in an enemy's country, is vested with any such power in virtue of his station; neither does the admiral on any station possess such authority.* He has, indeed, power relative to the ships under his immediate command, and can restrain them from committing acts of hostility; but he cannot go beyond that. *He cannot grant a safeguard of this kind beyond the limits of his own station.*" But Lord Stowell in this case upheld the licence, because it appeared that the British Government had recognised and ratified these licences; and the principle of *Ratihabitio mandato priori æquiparatur* was held to apply.

Allies.—In the case of allies trading with the enemy, the proper authority to grant licences is the Government of the nation to which the ship belongs. For, as it is the act of the Government which renders the nation liable to the penalty for trading with the enemy, the Government plainly has the power to modify its own act, and relieve its subjects from the penalty it has imposed.* In the year 1705, when England and Holland were allies in war against France and Spain, England attempted to stop all trade with the enemy on the part of English and Dutch merchants. But it appeared afterwards to the English Government, that, as the Dutch Government encouraged their merchants to trade to Spain under passes, it would not be in the power of England effectually to prevent this trade; and that it might prove very detrimental to England if Holland should, by this opportunity, gain possession of the bullion trade, and retain it after the war. Passes were immediately granted to English ships also.

A licence, therefore, is an act immediately proceeding from the Sovereign authority of the State; and the only question is,

* 4 Rob. 254 (note).

what authority the Sovereign, expressly or impliedly, grants to a subordinate officer.

Construction.—Licences, being high acts of sovereignty,* they are necessarily *stricti juris*, and must not be carried further than the intention of the great authority which grants them may be supposed to extend, not necessarily to be construed with pedantic accuracy, or that every small deviation should be held to vitiate the fair effect of them; but the two circumstances required to give the due effect to a licence are—first, that the intention of the granter shall be pursued; and secondly, that there shall be an entire *bona fides* on the part of the user. So that where a licence is altered it is invalid unless done by sufficient authority.† The fraudulent alteration of a licence destroys its validity even where the person claiming protection under it is innocent of the fraud,‡ and where there is a fraudulent application of a licence it will cease to be of any protection.§

Persons.—The licence may be granted to particular individuals, in which case it is presumable that the Government wishes to judge of the persons who are fit to be entrusted with an exemption from the ordinary restrictions of a state of war. Where, therefore, a licence was granted to certain persons as principals, and it appeared that they were merely agents, and had no original interest in the shipping, it was held that the property was not protected;‖ but in *The Christina Sophia*, referred to in this case, it appeared that a licence granted to Mr. S—— & Co. protected the property of third parties, whom Mr. S—— swore he originally intended to be included under the denomination *& Co.*

* *The Hope*, 1 Dod. 226; *The Cosmopolite*, 4 Rob. 11.
† *Ibid.*
‡ *The Henrietta*, 1 Dod. 168.
§ *The Louise Charlotte de Guildeneroni*, 1 Dod. 308.
‖ *The Jonge Johannes*, 4 Rob. 263.

Where a licence was given to a British merchant to *import*, it was held that it did not protect the shipments made by him in person in the enemy's country, as a merchant of that country.*

But where the terms of a licence are general it is of no consequence who are the individuals acting under it, nor will it be invalid if it has been sold for money; the holders will be protected by it, provided they act in compliance with the conditions annexed to it.†

Cargo.—The Court has been inclined to put a liberal construction on the question of cargo. Lord Stowell says:—"An excess in the *quantity* of goods permitted might not be considered as noxious to any extent. A variation in the *quality* or *substance* of the goods might be more significant, because a liberty assumed of importing one species of goods under a licence granted to import another might lead to very dangerous abuses."‡

Where a licence was granted for certain articles to an enemy's port and other articles were put on board with a professedly ulterior destination for such other articles to a neutral port, Lord Stowell, after pointing out what a clear opportunity was opened for fraud, and for the seizure, collusive or actual, by the enemy of the articles not included in the licence, declared it to be an abuse of the licence, and as such rendering it invalid. The property was, therefore, condemned;§ and thus in a licence for raw materials lace is not properly included.‖

Nationality of Vessel.—There must be a substantial compliance with any statement of neutrality of the vessel to be used.

Thus a licence for importation on board a neutral ship was held vitiated by the ship being considered British property.** But where the ship bears every appearance of being foreign,

* *The Jonge Klassina*, 5 Rob. 300.
† *The Acteon*, 2 Dod. 48.
‡ *The Cosmopolite*, 4 Rob. 10.
§ *The Vriendschap*, 4 Rob. 96.
‖ *The Juffrouw Catharina*, 5 Rob. 142.
** *The Jong Arend*, 5 Rob. 14.

the Court refused to investigate the matter further, and inquire whether there was any British interest.*

As between vessels of different countries that have the same political bearing towards Great Britain, the Court has not been in the habit of considering it a very material deviation, because where two nations have the same relative situation to England licences would be granted to the vessels of either country, with equal facility.†

But the Court will not permit the substitution of a ship belonging to a State at war for a neutral ship at the will and pleasure of the holder of the licence, but consider such to be a fraudulent use of the licence.‡

In these cases it appears that the cargo, if belonging to British subjects not implicated in the fraud, is protected.§

Time.—Another material circumstance in all licences is the limitation of time in which they are to be carried into effect, for as it is within the view of Government in granting these licences to combine all political and commercial considerations, a communication with the enemy might be very proper at one time, and at another very unfit and highly mischievous.‖

But where the party had used his best endeavours to fulfil his engagement, and had been prevented by the violence of the enemy from finishing the transaction in time, the Court decreed restitution, though it appeared the Government had refused to renew his licence; the delay in this case having been occasioned solely by the restraint imposed by the hostile Government.**

Where a ship came to London with corn under the protection of a British licence, and on her return was captured, her licence having expired, she was ordered to be restored, and the captors condemned in their expenses.††

* *Gute Hoffnung*, 1 Dod. 251.

† *The Dankbaarheit*, 1 Dod. 183. ‡ *Ibid.* § *Ibid.*

‖ *The Cosmopolite*, 4 Rob. 12. ** *The Æolus*, 1 Dod. 300.

†† *The Freundschaft*, 1 Dod. 316.

Where a licence was granted and peace was afterwards concluded, it was held that the licence was done away with and destroyed, so that on the breaking out of war *de novo* it was of no protection.*

Course of voyage.—The greatest strictness is required in following the course of the voyage, and the rules laid down do not much vary from those applied to policies of insurances for described voyages.

Thus a licence to come to any part of the United Kingdom was held not to protect a ship destined to Heligoland, though it had been reduced by conquest into British possession.†

And where a licence was granted to export a cargo from Leith to any port in Denmark, with liberty to touch at Christiansand for clearance, the ship not only touched at the latter port for clearance, but took on board some train oil for Copenhagen; this being held a fraud on the licence, being a carrying on of the enemy's commerce under a licence protecting only British exports, the ship and cargo were condemned.‡

Where a Danish ship had a licence to bring a cargo from Christiansand to Dublin, on condition that she should sail north-about, and she was captured going to Leith, where she intended to have delivered her cargo, if she could obtain permission; if not, to proceed to Dublin, Lord Stowell said:—"No voluntary deviation from the course pointed out can on any account be tolerated, and the only excuse for a departure from the terms prescribed is that it was done under the pressure of an irresistible necessity. Where the party is not within the terms of the licence the character of enemy revives, and the property of an enemy is subject to confiscation according to the laws of all civilized States. The parties may have been intentionally, still they are not legally, inno-

* *The Planter's Wensch*, 5 Rob. 22. † *The Edel Catharina*, 1 Dod. 55.
‡ *The Henrietta*, 1 Dod. 168.

cent; and I feel myself, therefore, under the necessity of pronouncing a sentence of condemnation.*

As a corollary to the fact that a licence is *stricti juris*, and requires entire *bona fides* on the part of the licensee, it gives no right to visit a permitted port, if under blockade, or to carry contraband goods, papers, or persons, or to resist search.†

General Licences.—Besides private licences granted to individuals, the Government may from time to time, by Orders in Council, grant a general licence to carry on a more or less restricted trade. It is evident that where such orders exist they require the same strict interpretation as if they were licences granted particular persons, and must be considered as special relaxations adopted from reasons of policy in particular wars, and as to which each nation must judge for itself.‡

Thus by Orders in Council of Feb. 1st, 1805, vessels laden with grain going to Spain were protected, but where contraband biscuit from the naval stores at Bordeaux was attempted to be sent to Cadiz under the protection of this order, being evidently destined for sea stores, it was condemned as a gross abuse of the order; and where, by the Order Nov. 14, 1806, innocent articles were permitted to be imported into France and her allies by Russia, it was held not to protect naval stores going to Amsterdam.§

An Order in Council prohibiting trading with the enemy applies to a part of the cargo as well as to the whole cargo,‖ (unless so very trifling as to bring it within the maxim *de minimis non curat lex*); and carrying passengers for hire is trading within the meaning of the Order.

In the Crimean war the rule of non-intercourse with the enemy was greatly relaxed by the belligerents, but it was done

* *The Manley*, 1 Dod. 257.

† Wheaton's Int. Law, 8th ed. by Dana, 505, note. The American law seems to be identical with the English, being taken from the same source, viz., Lord Stowell's judgments. See the authorities cited by Mr. Dana in his note.

‡ *The Nostra Signora de Piedade*, 6 Rob. 41.

§ *The Eleonora*, 6 Rob. 331. ‖ *The Rose in Bloom*, 1 Dod. 57.

by orders and proclamations in advance, professedly relaxing a rule which otherwise the Courts of Prize would have been obliged to apply; and the Court of Queen's Bench directed in *Esposito* v. *Bowden* * that these orders had no power to redintegrate contracts that had been dissolved by the declaration of war.

SECT. 3.—DECLARATION OF WAR.

The question often to be answered, is, When does the state of war first exist? † Mr. Justice Willes, in *Esposito* v. *Bowden*,‡ says:—

"The force of a declaration of war is equal to that of an Act of Parliament, prohibiting intercourse with the enemy, except by the Queen's licence. As an act of State, done by virtue of the prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law." This is undoubtedly the case where there has been an actual declaration of war by the supreme Government, but such a declaration need not be actually made. War may commence between two countries, bringing with it all the penalties for carrying on intercourse with the enemy, without any declaration.

"Formerly it was considered necessary to formally declare war to the enemy, in order to legalise hostilities between nations,§ but now no declaration or other notice to the enemy of the existence of war is necessary, the present usage being to publish a manifesto within the territory of the State declaring war, announcing the existence of hostilities, and the motives for commencing them. This publication may be necessary for the

* 4 E. & B. 693.

† For prospective war, however imminent, will not justify a breach of a contract.—*Pole* v. *Cetovich*, 9 C. B., N. S. 430.

‡ 7 E. & B. 763.

§ Wheaton's Int. Law, by Dana, 8th ed., p. 375.

instruction and direction of the subjects of the belligerent States in respect to their intercourse with the enemy, and regarding certain effects which the voluntary law of nations attributes to war in form."

But although it is customary for a State to notify to its subjects the commencement of the *status* of war with another independent State, this is not always done, nor is it always possible to do it. In the case, where a State attempts to separate itself from the community of which it formed part, and on which it was dependent, while the parent Government seeks to subdue the attempt by the use of force, all the rights of war may be conceded to the insurgents, although no declaration of war has been made, and their position as belligerents is not recognised. As this matter became of some importance in consequence of the late attempt of the Southern States of America to separate from the Union, it may not be out of place here to say a few words on the law of nations applicable to the case. History shows us that one of the most frequent origin of new communities is by a portion of an old State breaking off from the parent stock, and establishing its own independent existence. The ten tribes of Israel broke off from the kingdom of Judah. The colonies of ancient Greece and Phœnicia established their own independence. Rome broke into two empires; the Moorish kingdom in Spain and the north of Africa separated from the parent empire; and in modern times we find the Netherlands, Portugal, and the republics of South America, at various times breaking off from Spain, and establishing their independence—Belgium from Holland, United States from England, Texas from Mexico, &c. At the commencement of a separation of this kind it is a matter of policy whether the parent portion shall acquiesce in the proposed separation, or attempt to compel continuity by the use of force. If the employment of force is determined upon, it is impossible that war should be declared, because that would be to admit the independence of the insur-

gents, which is the main point in dispute; and yet it is necessary that war should be held to exist, otherwise the parties at issue are not only deprived of their respective rights, but the interests of third parties are compromised. Mr. Dana, in a note to Wheaton's International Law,* thus states the position:—

"If it is a war, all foreign citizens and officers, whether executive or judicial, are to follow one line of conduct. If it is not a war, they are to follow a totally different line. If it is a war, the commissioned cruisers of both sides may stop, search, and capture the foreign merchant vessel, and the vessel must make no resistance, and must submit to adjudication by a prize court. If it is not a war, the cruisers of neither party can stop or search the foreign merchant vessel, and that vessel may resist all attempts in that direction, and the ships of war of the foreign State may attack and capture any cruiser persisting in the attempt. If it is war, foreign nations must await the adjudication of prize tribunals. If it is not war, no such tribunal can be opened. If it is a war the parent State may institute a blockade *jure gentium* of the insurgent ports, which foreigners must respect; but if it is not war, foreign nations having large commercial intercourse with the country will not respect a closing of insurgent ports by paper decrees only. If it is a war, the insurgent cruisers are to be treated by foreign citizens and officials, at sea and in port as lawful belligerents. If it is not a war, those cruisers are pirates, and may be treated as such. If it is a war, the rules and risks respecting carrying contraband, or despatches, or military persons, come into play. If it is not a war, they do not. Within foreign jurisdiction, if it is a war, acts of the insurgents in the way of preparation and equipments for hostility may be breaches of the neutrality laws; while if it is not a war they do not come into that category, but into the category of piracy or of crimes by municipal law.

* 8th ed., p. 35.

"The United States did not declare war, because they refused to recognise any body politic as opposed to them, or capable of performing any functions of hostility, but claimed to regard the insurrection as a rebellion of individuals risen to the dimensions of a war. They did in practice treat the rebels as belligerents, holding them as prisoners of war, making use of exchanges and other practices of war, but this was from necessity, to prevent retaliation, and from humanity. But they refused to recognise any authority in the Confederated States capable even of making a surrender, and neither the existence nor the disappearance of the Confederacy was noticed legally by the United States." *

This being the view held by the Government of the United States, in the case of *The Amy Warwick*,† the counsel for the claimants contended that the mere existence of an armed rebellion holding forcible possession of territory does not *ipso facto* produce a state of war, so that all persons continuing within the limits of the territory so occupied become public enemies, and their property found at sea or elsewhere becomes liable to confiscation; but that citizens or subjects residing within the insurrectionary district not implicated in the rebellion, but adhering to their allegiance, are not enemies, nor to be regarded as such; this distinction being constantly observed in the disturbances in Scotland under the Pretenders of 1715 and 1745. But Sprague, J., answered this:—"As the Constitution gives Congress the power to declare war, some have thought that without such previous declaration in all its fulness, that is, carrying with it all the consequences of a war, war cannot exist. This is a manifest error. It ignores the fact that there are two parties to a war, and that it may be commenced by either. If a foreign nation should send its fleet and armies to capture our vessels, ravage our coasts, and invade our soil, would not that be war? Giving to the United States as a realm the position and rights

* Dana. † 2 Sprague's Decisions, 123.

of a belligerent, our enemies are at the same time belligerent and traitors, and subject to the liabilities of both, while the United States sustains the double character of belligerent and sovereign, and has the rights of both. These rights co-exist, and may be exercised at pleasure, although belligerent rights may be granted in a civil war. Yet a civil war *ex vi termini* imports that sovereign rights are not relinquished, but insisted upon. The war is waged to maintain them." *

Even where the war is not a civil one, it would appear that it is not necessary that there should be a declaration of war, if a state of war exists. Lord Stowell, in *The Nayade*,† in answer to the statement by the counsel for the claimants, "that there was nothing to show that Portugal was then in a state of war with France," said:—"The relation that country has borne towards France at different periods has been extremely ambiguous. At first there was a wish on the part of Portugal not to consider herself as being at war with France, and if a submissive conduct and a disposition not to resent injuries could have afforded protection against the violence of France, she might have escaped. But it is equally notorious that all these concessions were made without success, and proved utterly inefficacious to prevent Portugal from being complicated in a war with France. *In cases of these kinds it is by no means necessary that both countries should declare war.* Whatever might be the prostration and submissive demeanour on one side, if France was unwilling to accept that submission, and persisted in attacking Portugal, it was sufficient, and it cannot be doubted by anybody who has attended to the common state of public affairs, that Portugal was considered as engaged in war with France." (The ship in this case was condemned as the property of an ally trading with the enemy.)

But in the case of *The Staadt Embden*,‡ Lord Stowell refused

* See cases cited by Sprague, p. 133. † 4 Rob. 251.
‡ 1 Rob. p. 26.

to assert that Russia was at war with Holland, no declaration to that effect having formally announced it, although she had been co-operating with the fleet of Great Britain in the blockade of Amsterdam, remarking "that though an auxiliary fleet is not of itself sufficient to make its Government a principal in a war, yet when captures are made and prizes are claimed by that auxiliary force as taken *from a common enemy*, which has been repeatedly done in the present Dutch hostilities, it is not easy to discover the grounds on which the Government to which the auxiliary fleet belongs can be considered as entirely neutral." In this case the ship was condemned on other grounds, so that Lord Stowell did not think fit to determine the point; but it would seem that the Russians would either be enemies or pirates in such a case.

It appears, therefore, the existence or non-existence of war is a question of fact rather than of a previous declaration of war. With regard to a third power, to whose commercial interests the question of war or no war may be of vital importance, such third nation has a right to decide whether she recognises the insurgents as belligerents or not. It was this recognition of the Southern States as belligerents by Great Britain that was condemned by the United States as premature, the recognition of belligerency being an unfriendly act, unless justified by necessity. The answer of England being that it was necessary, owing to the magnitude of the struggle, that she should determine at once whether she would permit the right of search and blockade as acts of war, and whether the letters of marque or public ships of the rebels, which might appear at once in many parts of the world, should be treated as pirates or lawful belligerents.*

* Vide Wheaton's Int. Law, 8th ed., p. 34, *n.* 15.

PART II.

NEUTRAL TRADE.

Introduction.—By the progress of modern civilization every independent State has an incontestable right to remain at peace whilst other nations are engaged in war ;* and it has a right to carry on all its accustomed commerce, with the exception of contraband, without interference. A neutral, therefore, claims the privilege of being unmolested by either of the belligerents ; and this privilege is always granted, provided that the neutral State preserves strict impartiality between the contending parties, and does not favour one party to the detriment of the other. As war is the last appeal by the use of force to decide between the two belligerents, both of whom are presumed to believe themselves to have right on their side, a nation who decides to hold aloof from the struggle and to remain neutral, has clearly no right to decide upon the justice or injustice of the war ; nor to give physical or moral support to either side in a contest, to which by the exercise of her discretion she has declared herself to be no party. Provided, therefore, that a neutral nation practises strict and perfect impartiality, she is entitled by the law of nations to have her privileges guaranteed and her rights respected by the belligerents. Perfect impartiality is, therefore, the first duty that the Government and members of a nation must fulfil, before they can claim to have their own rights as

* This right does not appear to have been recognised by the ancients. According to ancient law he who was not an ally was an enemy.

neutrals respected. Any breach of this duty on the part of the Government would give the aggrieved belligerent a right to complain, and if necessary to resort to reprisals and actual war, and on the part of the individual members would render their property caught in the commission of the offence liable to capture and confiscation in the Prize Courts of the captors. With respect to what constitutes a breach of neutrality, the custom of nations has decided upon certain defined principles; but, as is well known, the complicated problems of life are never exactly solved by the application of any formula, so many different conditions occur in the investigation of any new question, that it cannot always be referred to simple laws. But in all doubtful cases, where the neutral has to decide whether any particular course of action would be a breach of his duty as a neutral, the simple test to be applied seems to be that of intention: does he intend, for the sake of profit or otherwise, to assist one belligerent more than another: if so, he intends to break his neutrality. Therefore the neutral should not only avoid doing that which is the result of an intention to be no longer impartial, but, remembering that owing to the imperfection of human means of acquiring knowledge, intentions are only to be judged of by actions, he should avoid all actions which apparently spring from such intention. The judgments of Lord Stowell are filled with most skilful analyses of the acts of the master and the crew, the nature of the cargo, as well as of the documents produced on board, in order to arrive at the intention of the parties; and too often the result showed that it was not the object of the neutral to carry on a legitimate trade, and at the same time to perform his duty as a neutral, but rather to do that which he intended to be a breach of that duty, with the hope of evading detection. In such a case the neutral knows the risk and runs it, and if unfortunately his enterprise miscarries he has but himself to thank. It then becomes a mere question of intellect on the one side to conceal, on the other to

discover, the intentions which prompted the act. And in such a contest, the opportunity that the Prize Courts have for a separate examination of all the parties concerned, the legal acumen possessed by the judges, with a knowledge of the many devices that have been tried before and exposed, are powerful weapons to contend against, and the neutral who had hoped that he was sailing just within the line, often discovers to his sorrow that he has crossed it.

It is proposed, therefore, to point out :—

1st. What are the privileges that a neutral who has not violated the law of his condition is entitled to enjoy : that is to say, what he may do without violation of either international or municipal law.

2nd. What the modern practice holds to be violation of international law, subjecting the delinquent to capture and confiscation if caught *in delicto.*

3rd. What is not only an offence against international, but also municipal law, rendering him answerable to the laws of his own country, as well as that of nations.

SECT. 1.—PRIVILEGES OF NEUTRALS.

The Privileges of Neutrals.—It is the undoubted privilege of a neutral nation to carry on trade with either of two belligerents, free from interruption by the other. "When two nations go to war, other nations who choose to remain at peace, retain their natural right to pursue their agriculture, manufactures, and other ordinary avocations ; to carry the produce of their industry for exchange to all countries, belligerent or neutral, as usual ; to come and go freely, without injury or molestation ; in short, war among other nations should be for

neutral nations as if it did not exist. The only restriction to the general freedom of commerce that is submitted to by nations at peace is that of not furnishing to either party contraband of war, nor anything whatever to a place blockaded by the enemy."*

Trade Peculiarly Belligerent.—Lord Stowell, however, held that where a neutral engages during war in a trade which is exclusively confined to the subjects of any country in peace and is interdicted to all others, and cannot be at any time carried on by a foreigner, such a trade is considered to be entirely national; and therefore follows the hostile situation of the country. Some doubt, however, on the point seems to exist in America.†

Neutrals entitled to carry the Goods and use the Ships of a Belligerent.—Where the belligerents are commercial nations and the neutral is the same, it is impossible that she can entirely hold herself aloof from the struggle and its consequences. The commercial navy of a State are not only the carrier of the goods of that State, but also the carriers of goods for the rest of the world who are not provided with a mercantile marine. As freedom from capture is a very important element in the transport of goods, it necessarily follows that a neutral whose ships offer such protection will for the time being become the carrier of the neutral world's commerce, and also of the belligerents', especially of the one who proves to be inferior at sea, and has for her own protection to turn the whole of her marine resources as far as possible into the means of defence, and thus to leave the carrying of her trade, and the supply of cargoes to her shores, to the protection of neutrals. And often, on the other hand, the goods of the neutral are already on board the

* Wheaton's Int. Law, s. 491, quoting Mr. Jefferson's letter to Mr. Pinkney, 7th Sept., 1793, United States papers, i. 393.

† *The Princessa*, 2 Rob. 52; *The Anna Catherina*, 4 Rob. 118; *The Rendsborg*, 4 Rob. 121; *The Vrow Anna Catherina*, 5 Rob. 130; Wheaton's Int. Law, s. 508.

vessels of one of the belligerents. The question, then, is, What is the status of the neutral under these circumstances?

The Declaration of 1856.—This question in former wars always arose, and it has always been answered according to the interests of the Power replying. But after a long dispute, and the pressure that was put on Great Britain by the armed Confederacy of the North during the wars at the commencement of this century, a Declaration was made at Paris in the year 1856, to which Great Britain, France, Russia, Prussia, Austria, Sardinia, and Turkey were the original parties. Some forty other Powers gave in their adhesion to the Declaration, embracing nearly all the States of Europe and South America. The United States alone held aloof, on account of the first article of the Declaration, which was, "Privateering is and remains abolished." That nation offered to submit to this article if all private property at sea not contraband was protected from capture. This was refused, and the United States withdrew the offer. The second article of the Declaration is:—

That the neutral flag covers the cargo of the enemy, except when it is contraband of war.

3rd. That neutral goods, except contraband of war, are not seizable under the enemy's flag.

4th. That blockades to be obligatory are to be effective.

The last clause of the Declaration is in these words:—"The present Declaration is not and shall not be binding, except between those Powers who have acceded or shall accede to it."

The effect of the Declaration of 1856.—In any future war,

therefore, between Great Britain and the other parties to this Declaration, it will be recognised that it is the right of neutrals to send their goods, not contraband of war, by the vessels of either belligerent, or to carry goods of either of the belligerents in their own vessels free from capture.

Case of the United States, &c.—In the case of the United States, or any other nation who is not a party to the Declaration, it is doubtful whether they could claim the benefit of this Declaration, when they were neutral, not being parties to the Declaration of Paris. The question, if it arose, would be probably settled as a question of diplomatic policy rather than of legal interpretation of the words of the Declaration.

If it is considered that the protection of the neutral flag is not only a privilege granted to the neutral ship, but also to the belligerent, then where such belligerent has acceded to the Declaration it clearly has a right to claim that its goods shall be free under the flag of a neutral nation, though that nation should be the United States, or any other nation not a party to the Declaration. The fact that the Declaration abolishes privateering shows that its spirit is in favour of ameliorating the rigour of war, not only with regard to the commerce of neutrals, but that of the belligerents themselves. If, however, it should be held that the protection of the neutral flag is one granted the neutral nation only, to protect its commerce from annoyance and loss, then it is difficult to understand with what justice a neutral nation can claim the privileges granted by a declaration to which it is no party. *Qui sentit commodum sentire debet et onus.*

This would, however, it appears, apply to the second of the articles only, for it seems to have long been admitted between Great Britain and the United States that neutral goods are not subject to capture from the mere fact of their being on board an enemy's vessel.*

War with the United States, &c.—With regard to a war with

* Dana, Wheaton's, note 223.

the United States, the same difficulty would arise in the case of a neutral a party to the Declaration, carrying in its vessels the goods of the United States. If the privilege is one granted to the neutral of carrying the property of either belligerent free from capture, then how could Great Britain violate the privilege to which it is a party? But if the privilege is one granted to the belligerent, the United States could not claim it, and the neutral must put up with the annoyance and loss. If it were decided that it is a privilege granted to, and thereby to be claimed by, the neutral, England would be in this anomalous position:—Her goods would be liable to seizure by the United States on board neutral vessels, whilst the goods of that country would be free from capture—a result which shows an absence of that reciprocity without which no system of international dealing can work well.

Mr. Dana, in note 223 to his edition of Wheaton's International Law, points out many other difficulties in the working of this Declaration: as, if one party disregards it, can the other retaliate? If so, will not the neutral whose rights are invaded have a fair ground of complaint and for reprisal? and would such conduct not amount to a breach of treaty and a *casus belli*? But that author expresses a hope that from the number and power of the nations parties to it, with the increase of the influence of commerce and of capital interested in neutral trade, the Declaration may be sustained, even if it does not, by the accession of the United States, grow into international law.

Such, then, appears to be the present state of international law with respect to the right of a neutral to carry belligerent goods not being contraband, and to send their own goods not contraband in belligerent vessels.

SECT. 2.—VIOLATION OF NEUTRALITY.

The Privileges of Neutrals conditional.—But these privileges are only granted and secured to neutral vessels on certain conditions. The ancient rigour of war confiscated not only neutral property on board belligerent vessels, but belligerent property in neutral vessels, and often confiscated the neutral vessel as a penalty for carrying belligerent property. Modern civilisation, as we see, however, tends to protect both these classes of goods where not contraband; but such protection is only given where there is perfect *bona fides* on the part of the neutral owner of ship or cargo, failing which, as the following decisions show, he is at once deprived of the privilege, and his property confiscated.

Enemy's Property in Ship.—It has been decided in the Prize Courts both of Great Britain and the United States that the privilege of the neutral flag of protecting enemy's property, whether stipulated by treaty or established by municipal ordinances, however comprehensive may be the terms in which it may be expressed, cannot be interpreted to extend to the fraudulent use of that flag to cover enemy's property in the ship as well as in the cargo.*

Resistance to Search.—And where a neutral ship refuses to submit to search, which, as we shall see, is a cause of condemnation, the protection of the neutral flag is lost. "If a neutral master," says Sir W. Scott, "attempts a rescue or withdraws himself from search, he violates a duty which is imposed upon him by the law of nations to submit to search, and to come in for inquiry as to the property of the ship and cargo; and if he violates this obligation by a recurrence to force, the consequences will undoubtedly reach the property of his owner; and it would, I think, extend also to the whole property entrusted to his care,

* Wheaton's Int. Law, s. 473; *The Citade de Lisboa*, 6 Rob. 358; *The Erstern* 2 Dallas, 34.

and thus fraudulently attempted to be withdrawn from the operation of the rights of war. With an enemy master the case is very different. No duty is violated by such an act on his part, *lupum auribus teneo*, and if he can withdraw himself he has a right to do so."*

So in the case of *The Maria*.† The resistance of the Swedish man-of-war convoying the merchantmen was held to be the resistance of the whole convoy, and being a breach of neutrality, subjected the whole to confiscation.

It appears, then, that neutral goods shipped in neutral vessels are under this disadvantage, which they would not be if they were shipped in the vessel of a belligerent, that they are liable to confiscation if the neutral vessel violates her neutrality, whilst in an enemy's vessel they are safe under any circumstances.‡ But this is counterbalanced, perhaps, because that goods shipped in a neutral vessel are absolutely secure from either confiscation or delay as long as the vessel preserves her neutrality, whilst in an enemy's vessel the neutral goods, if free from condemnation, are always liable to arrest and to be carried into the captor's ports for inquiry; so that the owner has the annoyance and risk of proving to the satisfaction of the Prize Court his neutral title.

Neutral Goods in Armed Belligerent Vessels.—But where the neutral ships his goods in an *armed* enemy's vessel, Lord Stowell § declared that the goods were liable to be confiscated. In an American case,‖ however, three judges against two held the contrary opinion; but one of the two, the celebrated Mr. Justice Story, however, gave an elaborate decision that supports Lord Stowell, in which Mr. Dana seems to agree.** That judge says:—

"The fact that a neutral's goods are found in an enemy's ship does not taint them with hostility. The goods stand or fall

* *The Catherina Elizabeth*, 5 Rob. 232. † 1 Rob. 340, vide *post*, 63.
‡ Vide *supra*. § *The Fanny*, 1 Dod. 443. ‖ *The Nereide*, 9 Cranch, 388.
** Dana, Wheaton's Int. Law, note 243.

upon their own character. If they are *bonâ fide* neutral and are involved in no illegal act, they are restored; but though neutral, they will be condemned if so involved. If a neutral voluntarily and knowingly places them in the custody of an enemy who is armed for the purpose of resisting or capturing the resisting belligerent, as the fortune of war may turn, and contributes by freight if no otherwise to the ability of the enemy, he cannot, if resistance is actually made and fails, claim the protection of his bare neutrality against the captors."

And he thus further distinguishes the case of a chartered ship:—

"I cannot bring my mind to believe that the neutral can charter an armed enemy's ship, and victual her and man her with an enemy crew (for though furnished directly by the owner, they are in effect paid and supported by the charterer), with the avowed knowledge and necessary intent that she should resist every enemy; that he can take on board hostile shipments on freights, commissions, and profits; that he can stipulate expressly for the benefit and use of enemy convoy, and navigate during the voyage under its guns and protection; that he can be the general projector and conductor of the voyage, co-operate in all the plans of the general owner of the vessel to render resistance to search secure and effectual; and yet notwithstanding all this conduct, by the law of nations may shelter his property from confiscation, and claim the privilege of an inoffensive neutral. On the contrary, it seems to me that such conduct is utterly irreconcileable with the good faith of a friend, and unites all the qualities of the most odious hostility. It wears the habiliments of neutrality only when the sword and the armour of an enemy become useless for defence."

To the argument from the fact that the armed vessel had no commission or letter of marque, the learned Judge answered that these were matters entirely between that vessel and her government. It would seem, therefore, that the law laid down

by the English courts, and recognised by some of the American judges, is, that if a neutral sends his property in an enemy's vessel prepared for resistance, *pro hâc vice*, he sides with the enemy, and violates his neutrality.

Convoy.—A similar decision seems to have been given by Lord Stowell* where a neutral vessel sails with an enemy's convoy:—"The rule of international law is that there is a conclusive presumption that the act is not to render protection to neutrals that are not liable to capture, but to screen offending neutrals from search and if possible from capture." Judge Story says in *The Nereide*:†—"My judgment is, that the act of sailing under belligerent convoy is a violation of neutrality; and the ship and cargo if caught *in delicto* are justly confiscable; and further, if resistance is necessary, as in my opinion it is not, in order to perfect the offence, still the resistance of the convoy is to all purposes the resistance of the association."

Note.—It appears, however, that America effectually disputed this position in the Danish claims of 1810. The Danish Government had captured neutral American vessels who had made use of British convoy. Finally in 1830 the Danes stipulated to indemnify the American claimants on the understanding that no precedent was to be considered established.‡

Neutral Convoy.—The English decisions do not hold that sailing under neutral convoy is evidence of any intention to resist or obstruct search. At the same time, Lord Stowell laid it down in *The Maria*§ "That the presence of a neutral armed cruiser cannot protect the neutral merchantmen which she convoys from the legal right a belligerent has of search, in

* *The Scorpion*, referred to in the *Maria*, 1 Rob. 340. † 9 Cranch, 388.

‡ 1 Dana, Intern., note 245. This author appears to think that the Danes had right on their side, and quotes Kent, i. 154-7; Duer on Insurance, i. 730; Woolsey, s. 193; Ueteleman, ii. 126; and Manning, 369, who hold that sailing under enemy's convoy is conclusive against the neutral. Hautefeuille, tom. ii. 162-4, states the argument, but gives no opinion; D'Ortolan, tom. ii., c. 7, p. 245, considers that though generally illegal it may yet be excusable.

§ 1 Rob. 340.

the absence of an express permission to that effect, by treaty or otherwise, between the respective Sovereigns; nor is the mere guarantee of the commanding officer a sufficient substitute for search." *

Resistance to Search.—Where, however, the neutral sails in convoy for the purpose of resisting search, as was the case of *The Maria,* where the neutral cruiser had instructions to resist search, and did resist, the fact is conclusive against the neutral; and Judge Story said, in *The Nereide,*† "The very act of sailing under the protection of a belligerent or neutral convoy *for the purpose of resisting search,* is a violation of neutrality."

SECT. 3.—RIGHT OF SEARCH.

Right of Search.—The belligerent, as we have seen, therefore possesses the right to stop and search neutral vessels on the high seas, even when the vessel is sailing under the protection of an armed public vessel of the neutral nation, unless by treaty between the neutral and the belligerent the presence of such an armed vessel protects the neutral merchandise from stoppage and search; and the neutral must submit to the search and make no resistance, but submit to capture and the adjudication of the Prize Court of the captor; for any resistance will be a cause in itself for the condemnation of the vessel. Where manifest injustice is done, the neutral must first seek his remedy in the Prize Court of the captors, and if justice is there denied him, he must appeal to his own Government for redress.

* The fact that the presence of a neutral cruiser does not relieve the merchantmen from search, is now recognised, though the contrary view was held by the armed neutrality of 1800, but was renounced in the treaty of June 17, 1801. See Wheaton's Int. Law, s. 527, and note 242, by Dana; Kent's Comm., i. 154-7; Woolsey's Introd. s. 192; Halleck's Int. Law, 613-9; Phillimore's Int. Law, iii., s. 338; Manning's Int. Law, 360; Wildman's Int. Law, ii., 124.

† 9 Cranch, 438.

In the case of *The Maria*,* Lord Stowell lays it down :—

> "That the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destination, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation.
>
> "That the authority of the Sovereign of the neutral country being interposed in any manner of mere force cannot legally vary the rights of a lawfully commissioned belligerent cruiser (that is to say, the mere presence of a neutral man-of-war does not protect neutral merchantmen from visitation).
>
> "That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search.

"I don't say that cases may not occur in which a ship may be authorised by the natural right of self-preservation to defend itself against extreme violence threatened by a cruiser grossly abusing his commission; but where the utmost injury threatened is the being carried in for inquiry into the nearest port, subject to a full responsibility in costs and damages if this is done vexatiously and without cause, a merchant vessel has not a right to say for itself (and an armed vessel has no right to say for it)—'I will submit to no such inquiry, but I will take the law into my own hands by force.' What is to be the issue, if each neutral vessel has a right to judge for itself in the first instance whether *it is rightly detained*, and to act upon that judgment to the extent of using force? Surely nothing but battle and bloodshed, as often as there is

* 1 Rob. 340.

anything like an equality of force, or an equality of spirit. For how often will the case occur in which a neutral vessel will judge itself to be rightly detained? I take the rule of law to be that the vessel shall submit to the inquiry proposed, looking with confidence to those tribunals whose noblest office (and I hope not the least acceptable to them) is to relieve by compensation inconveniences of this kind where they have happened through accident or error; and to redress by compensation and punishment injuries that have been committed by design."

This duty on the part of neutral merchant ships to submit to search by a lawfully commissioned cruiser is one that has at all times been admitted even by those nations most jealous of their rights as neutrals, as was the case with the powers that entered into the armed neutrality of 1800, who refused to claim for those of their ships who resisted search the rights of neutrality. This right is founded not only on international law, but upon the necessities of war. The fraudulent use of a neutral flag and papers by a belligerent is a thing to be expected; and a commissioned cruiser has a right to demand of each vessel it meets whether it is a neutral, and to seek confirmation of the evidence given by the investigation of the documents and papers on board, and by inquiring into the nature of the cargo and the destination of the vessel, in order to gain what light he can upon the actual ownership. And where there is, or there is thought to be, cause for suspicion, there must be a right to take the suspected vessel in for adjudication in the Prize Courts of the captor, leaving the neutral to the remedy these courts will give him in case of innocence, and failing such remedy, to redress that his Government is bound to procure for him.

RESCUE.

Rescue of Neutral Vessel.—Rather a curious question of law

arises in the case of a neutral vessel rescued from the power of a belligerent by the original crew. All resistance on the part of the neutral crew is, as we have seen, in itself a ground of condemnation; so that in such a case the very act that deprives a belligerent of the custody of a neutral ship effectually gives him the right to the possession. In the case of *The Emily St. Pierre*,* an English vessel, captured in the act of running the blockade off Charleston, and sent to Philadelphia for adjudication, was rescued by the original crew, who took her to Liverpool. The restoration of the vessel was asked for by the American Minister, on the ground that the rescue was in itself a violation of the law of nations. Earl Russell refused the demand on the grounds:—

1st. That the rescue was not a violation of the municipal law of England, and therefore he had no right to interfere.

2nd. That if it was an offence against the law of nations, the only punishment was condemnation in the Prize Courts of the captors, and no other.

Recapture.—Mr. Wheaton seems to think that in case of a subsequent recapture, the right of the original captors would be reverted. This hardly seems to be the case, for it is fully recognised that unless a neutral vessel is captured *in delicto* she cannot afterwards be condemned if captured on another and innocent voyage. And if this be the case, wherein does a rescue differ from resistance to search, except in degree? Both are grounds of confiscation. No one, however, would contend that by mere resistance the would-be captor acquires such a right of possession—*jus in rem*—that it is good against all the world. In what, then, does a rescue differ from resistance unless the neutral is seized, *dum fervet opus*, before the

* Dana, note 183.

rescue can well be said to be complete? Surely a neutral who feels that it has broken the laws of neutrality, and will inevitably be treated as an enemy, has a right to act as an enemy, and, as Lord Stowell says—*Lupum auribus teneo.* All, it would therefore appear, that resistance or rescue can be said to amount to is waiver of the rights of neutrality, and a confession that, *pro hâc vice,* the neutral is an enemy. Such conduct may indeed be just grounds for condemnation if the capture is made *in delicto,* but it would appear to be arguing in a circle to say that the act that deprives a belligerent of possession perfects his title to hold it.

Right of Approach.—Though a merchant ship is bound to submit to the examination of a lawfully commissioned cruiser, yet the intention of search must be clearly notified to her. There seems to be some doubt as to the necessary mode to be employed, but Dr. Twiss says:*—"Upon a careful review of the practice of the European Powers in modern times, it would appear that no neutral ship is bound to shorten sail unless the belligerent cruiser fires a gun to warn her of her intention to visit her. The two conditions which ought to be fulfilled by the belligerent cruiser, in justice to the master of the neutral merchant vessel, before the latter can be held to act in contravention of any belligerent right, are that the true character of the cruiser herself shall be made known to him by the exhibition of her military flag, and that her intention to visit the merchant vessel in virtue of her belligerent right shall be notified to him by the firing of a gun."

Resistance to Search through ignorance of Hostilities.—Lord Stowell decided† that where a vessel sails in ignorance of war, and is unconscious that it has any neutral duties to perform, refusal to permit a boat's crew to board, and attempting to escape, were not breaches of the neutral's obligation.

* Twiss's Law of Nations, *War.*

† *The San Juan Baptista,* 5 Rob. 33.

SECT. 4.—SHIP'S PAPERS.

Ship's Papers.—Another duty imposed upon a neutral is that of being furnished with the proper documents necessary to support her character of neutrality; and the object of the right of visit is, by Art. XVII. of the Treaty of the Pyrenees, which is considered to embody the common law of nations on the subject, stated to be for the purpose of inspecting the ship's pass, or sea-letter, whereby the nature of her cargo, and likewise the domicil, residence, and names of her master and owner, as well as of the vessel itself, may be ascertained.* But it appears that some modification in this practice has taken place. And now it is only necessary for a vessel to exhibit a pass, or sea-letter, where she claims the privileges of a treaty which requires such pass or sea-letter. In other cases it is sufficient if there are other papers on board which satisfactorily establish the character, property, and destination of the ship and cargo, as the builder's contract, the bill of sale, if she has changed hands; the certificate of registry where it is required by the municipal law of her flag; with regard to the cargo, in the case of a general ship, the manifest and bills of lading; in the case of a chartered ship, her charter party. If these are on board, and their *bona fides* not impeached, the documentary evidence is sufficient. But the absence of these papers, although not a ground for condemnation, will justify a belligerent sending the vessel into port for inquiry, in order that the master may satisfactorily account before a Court of Prize for the absence of the missing document.† And in an American case, *Livingston* v. *the Marine Insurance Company*,‡ Mr. Justice Story laid it down that:—

"Though concealment and even spoliation of papers do not

* Dr. Twiss's Law of Nations, *War*, p. 183.

† Ibid., and see Kent's Comm., vol. i., p. 161. ‡ 7 Cranch, p. 545.

ordinarily induce a condemnation of the property, they always afford cause of suspicion, and justify capture and detention."

And Lord Stowell said * "that, though by the law of every maritime court in Europe, spoliation of a ship's papers raises a presumption *juris et de jure* that it was done for the purpose of fraudulently suppressing evidence, and *per se* infers condemnation, yet the English Courts do not follow this rule in all its rigour, but allow it to be shown that it has been done for other motives, provided that all other circumstances are clear. But still it generates a most unfavourable impression, and it is necessary in such a case that overwhelming proof arising from the concurrence of every other circumstance must remove the powerful impression which such an act makes to its entire reprobation."

From these cases, therefore, it appears that in Great Britain and the United States, there is only a presumption raised by the concealment or spoliation of a vessel's papers against the vessel, but that such presumption may be rebutted; and so the English Court of Common Pleas has laid down that the use of false papers is not in itself such a breach of neutrality as to make a forfeiture of the ship, but only evidence from which a cause of forfeiture may be inferred.† It is evidence on which the Judge may find a cause of forfeiture approved, but it is in itself no cause of forfeiture.

So in the case of *The Pizarro*.‡ It was held in the American Courts that the absence of a pass or sea-letter required by a particular treaty was no substantive ground for confiscation of the ship, but merely justified her capture, and authorised the captors to send her into a proper port for adjudication. The parties might explain, for the spoliation of the papers may be caused by accident or superior force.§

From these decisions it results that where a vessel's papers

* *The Hunter*, 1 Dods. 480.

† *Hills* v. *Hemming*, 5 New Rep., p. 411. ‡ 2 Wheaton, p. 243.

§ Et vide, per Lord Mansfield, *Bernardi* v. *Motteux*, Dougl., p. 581.

are wanting, or are not free from a suspicion of *mala fides*, the onus is thrown on the neutral owner of explanation, and he renders himself liable, if not to condemnation, at least to the expense and inconvenience, the loss of market, &c., arising from the delay.

SECT. 5.—CONTRABAND.

Contraband.—The Declaration of Paris of 1856, if it should be carried into effect in future wars, provides, as we have seen, for the safe transport of belligerent goods in neutral vessels, and of neutral goods in belligerent vessels, provided in both cases that they are not contraband of war. It therefore becomes a material question to inquire into the nature of contraband, what amounts to the carrying of contraband, and what penalty is attached to its transport by neutral vessels?

And this inquiry is the more necessary because the old law of contraband may be considerably modified in future wars. At the time that the various treaties were made, and the points decided in the various Prize Courts of Europe and America, water transport was in reality the only practicable method of conveying certain classes of goods, but since the introduction of the steam-engine, transport by rail is far more expeditious and cheaper than by water. And therefore the contraband that was formerly of necessity carried to the belligerent commercial or naval port may now be taken to a neighbouring neutral one, and there at once placed on railway trucks, and carried to the ultimate place of destination. And this can be done with impunity according to the present law of contraband,* for by the law of nations the transport of contraband of war to a neutral port by neutral ships is not an offence against international law. Great Britain is more particularly interested in this inquiry, for being shut off by the sea from Continental Europe, in case of war with a

* *Vide post*, on the subject of land carriage to a blockaded port.

European Power, all supplies that reach her by neutral ships can only be conveyed to her ports direct, and are liable to confiscation, if contraband, whilst in the case of her enemy the supplies may be taken to a neutral port and then carried overland, with impunity. In all probability in the future it will be determined not as a question of law, but of fact, whether contraband articles with an ultimate hostile destination, are free from capture though immediately destined to a neutral port, the transport being continued by rail.

Nature of Contraband.—The various classes of property carried at sea are thus divided by the various writers on international law:*—

1. Those things whose primary use is for the purposes of war.

2. Those things whose primary use may be for war or peace according to circumstances, and therefore described as *res ancipitis usus.*

3. Those things whose primary use is for the purposes of peace.

No article would appear to be of conclusive use for the purposes of war. Thus Bynkershoek † says that swords are worn for the purposes of ornament. Gunpowder is used for blasting and saluting, and Dana adds ‡ that fire-arms are used for police purposes, for killing game, for private defence, &c.; mortars and shells for the humane object of communicating with wrecked vessels. "But the question—What is the primary and ordinary use of such things in time of war, when in the enemy's possession? It is agreed that all forms of fire-arms, swords, powder and ball, come within this category. It is a question of detail only after the text is agreed upon, what articles come under it."§ There are things, on the other hand, which come under the third head, as to which it is impossible even to imagine a direct military purpose, as a cargo of pianofortes,

* Grotius de Jur. Bell. et Pac., lib. iii., c. 1, s. 5; Vattel, Droit des Gens, liv. iii., c. 7, 112; Bynkershoek, Quæst. Jur. Pub., lib. i., c. 10.

† Ibid. Quæst. Jur. Pub. lib. i. c. 10. ‡ Note 226. § Dana, ibid.

works of fine art, and a library of books of theology, or of belles-lettres, &c.

The principal point in dispute between nations is therefore the question what articles come under the second head that are of ambiguous use (*ancipitis usus*). "The best illustration of this class is perhaps manufactured spars ready to be put into ships, and in later times marine steam machinery in like condition of readiness, and coal." *

The question whether or not articles of the third class, being capable of double use, are or are not contraband of war, has never yet received an authoritative determination. Lord Stowell in his decisions pressed without doubt somewhat hardly upon the interest of neutrals, confiscating many classes of goods as contraband which in the opinion of other nations ought to have been permitted to pass free. The fact is, in this case, as in many others, the point of view is determined by the position in which interest places the observer. England, owing to her insular position and extended colonies, has always relied more on her navy than her army, and hitherto she has generally been the mistress of the sea during war. She therefore has always found it her interest to restrict as much as possible the assistance that neutral trade gives her enemy. America, being insulated from European contests, has always been disposed to take the same view. But on the Continent the position is reversed, and we find not only the writers but also the Governments and the Courts upholding and extending the rights of neutrals. In consequence of the pressure that was put on England by the armed neutrality of 1800, and at other times, the severity of some of Lord Stowell's decisions appears to have been relaxed.

The two kinds of cargo that have been most the subject of dispute are:

1. Provisions.
2. Naval stores.

* Dana, note 226.

1. *Provisions.*—During the wars with France at the end of the last century* England directed her cruisers to stop all vessels laden wholly or in part with corn, flour, or meal bound to any port in France, and to send them to an English port, not for condemnation, but for purchase, on the ground that France having armed all her labouring population, had no right to be relieved in her distress. This order was repeated,† and in a dispute with the United States it was attempted to support the justice of it by reference to a dictum of Vattel.‡

Commodities particularly useful in war, and the carrying of which to an enemy is prohibited, are called contraband goods, such as arms, ammunition, timber for ship-building, every kind of naval stores, horses, *and even provisions in certain junctures where we have hopes of reducing the enemy by famine.*§ Lord Stowell, in his decisions, seems to have decided the question whether provisions were or were not contraband by a reference to their destination. In the case of *The Jonge Margaretha,*‖ he says:—"The nature and quality of the port to which the articles were going is a test of the matter of fact to which the destination is to be applied. If the port is a general commercial port, it shall be understood that the articles were going for civil use, though occasionally a frigate or other ships of war may be constructed in that port. On the contrary, if the great predominant character of a port be that of a port of naval equipment, it shall be intended that the articles were going for military use, though merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption, for it being impossible to ascertain the final application of an article *ancipitis usus,* it is not an injurious rule which deduces, both ways, the final use from the immediate destination. And the presumption of a hostile use

* 8th June, 1793. † April, 1795.

‡ See Wheaton's Int. Law, s. 494.

§ Droit des Gens, liv. iii., c. 7, s. 112. ‖ 1 Rob. 189.

founded on its destination to a military port is very much influenced if at the time when the articles were going a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful."

On these principles Lord Stowell decided in this case that cheese going to Brest from Amsterdam was contraband, but where the cheese was going not to a port of naval equipment, but only to the neighbourhood, it was declared not contraband.* Wine going from Bordeaux to Brest was condemned.† And as we have seen,‡ a supply of sea biscuit going to Cadiz was declared confiscated, although a general licence to send *provisions* to Spain had been granted; Lord Stowell holding that a supply of sea biscuit as a naval store was a fraud upon the licence.

In America, in the celebrated case of *The Commercen*,§ it was held that the supply of provisions to an English fleet at Spain was a carrying of contraband by the neutral so as to deprive him of the freight to which a neutral was generally held entitled where he was carrying enemy's goods not contraband, on their being seized by a belligerent. The peculiarity of the position in that case was—England was carrying on war in Spain against France, and was at the same time at war with the United States, the causes and objects of the two wars being entirely distinct. Yet it was held that the supply of provisions to the British army so far assisted England in the one war that she had more power to devote to the other, and therefore it was a violation of neutrality depriving the master of his freight.

2. *Naval Stores.*—The real question, then, with respect to provisions seems to be,—Are they likely from their destination to become of use as naval or military stores to the enemy; if so

* *The Frau Margaretha*, 4 Rob. 92.
† *The Edward*, 4 Rob. 68.
‡ *Vide supra*, *The Ranger*, 4 Rob. 126.
§ Wheaton, 1 Rep. 382.

they are contraband. As to what are naval contraband stores, in the case of *The Maria*,* Lord Stowell said—"That tar, pitch, and hemp going to the enemy's use are liable to be seized as contraband in their own nature, cannot, I conceive, be doubted under the modern law of nations."

In *The Jonge Margaretha*,† Lord Stowell makes a distinction between manufactured and unmanufactured goods. Iron is treated with more indulgence than anchors, hemp than cordage, wheat than food finally prepared, &c. In the case of *The Charlotte*,‡ large masts and spars in a manufactured state were held contraband, apparently irrespective of the port of destination.§ Also copper sheeting reputed fit for the sheathing of vessels; but some doubt was expressed in the case of copper merely in sheets.

And Lord Stowell‖ declared a ship of war contraband if going to be sold to the enemy.

Here was an avowed intention of going to sell a ship to a belligerent—which in the time of war is at least a very suspicious act—and to do a great deal more, to sell a ship which the neutral owner knew to be peculiarly adapted for the purpose of war, and with a declared expectation that it would be hostilely employed against this country. It cannot surely under any point of view but be considered as a very hostile act to be carrying a supply of a most powerful instrument of mischief, of contraband ready made up, to the enemy for hostile use, and intended for that use by the seller, and with an avowed knowledge that it would be so applied. The ship was condemned. And so in the case of *The Brutus* (Lords, July 27, 1804),** which was a ship recently built for war, and not fit for commerce, and going to the Havannah to be sold, was condemned as contraband. But it appears by comparison of the cases that this principle is

* 1 Rob. 372. † 1 Rob. 192. ‡ 5 Rob. 305. § *Ibid.* 275.
‖ *The Richmond*, 5 Rob. 331.
** 5 Rob. Rep. 331, and Appendix, No. 1, with cases referred to.

applied only to cases where there is no doubt of the character of the vessels and the purpose for which they were intended to be sold. In *The Rouen* (Lords, 13th June, 1804), a French privateer, condemned as such, had been sold at New York; the purchaser had bought her for the purposes of trade, and used his best endeavours to make her fit for that service, but found her unsuitable, and was on that account intending to sell her again; was ordered to be restored.*

Lord Stowell, however, as in the case of provisions, where goods were not contraband *per se*, but only *ancipitis usus*, inquired into the destination;† and drew a distinction in *The Neptunus* between tallow shipped to a mercantile port, and declared not contraband, whilst if it had been taken to Brest there would have been little doubt about its being contraband. And in another case,‡ resin going to Nantes was declared not contraband.

Native Produce.—Sweden and the other neutral countries disputed that pitch, tar, &c., were contraband if they were the native produce of the neutral country; and finally, by the treaty of 1803, the rigour of the rule was relaxed, and they were declared not liable to condemnation as contraband *per se*, but only to the right of pre-emption. And this was recognised by Lord Stowell in the following decisions:—

"With respect to certain articles generally considered as contraband, which are the produce of particular countries, as the case of pitch and tar, which constitute the great staple commodity of Sweden, the rule was relaxed, and the articles, instead of being confiscated, are merely subject to the right of pre-emption.§ And this privilege is not lost by the goods being sent on board the ships of another country.‖ But although pre-

* As to the question, how far such sale is an offence against municipal law, *vide infra*, Foreign Enlistment 1870, p. 114.

† 3 Rob. 108. ‡ Nostra Signora de Begone, 5 Rob. 97.

§ *The Apollo*, 4 Rob. 161; *The Twee Juffrouwen*, 4 Rob. 242.

‖ *The Apollo*, *supra*.

emption of contraband articles is substituted in the case of the native produce and ordinary commerce of a neutral country in the place of confiscation by the modern law of nations, strict good faith is required; and for a false destination, fraudulent papers, &c., the cargo will be condemned."*

Pre-emption.—The nature of the right of pre-emption is thus explained by Lord Stowell in the case of *The Haabet*,† which was a cargo of wheat going to Cadiz:—

"The right of taking possession of cargoes of this description, *commeatus*, or provisions going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent nations. The ancient practice of Europe, or at least of several maritime States of Europe, was to confiscate them entirely. A century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times of holding such cargoes subject only to a right of pre-emption, that is, to a right of purchase, upon a reasonable compensation to the individual whose property is thus diverted. I have never understood that on the side of the belligerent this claim goes beyond the case of cargoes avowedly bound to the enemy's ports, or suspected on just grounds to have a concealed destination of that kind; or that on the side of the neutral the same exact compensation is to be expected which he might have demanded from the enemy in his own port. The enemy may be distressed by famine, and may be driven by his necessities to pay a famine price for the commodity if it gets there. It does not follow that, acting upon my rights of war in intercepting such supplies, I am under the obligation of paying that price of distress. It is a mitigated exercise of war upon which my purchase is made, and no rule has established that such a purchase shall be regulated exactly upon the same terms of profit which would have followed the adventure if no such exercise of war had intervened. It is a reasonable indemnification

* *The Sarah Christina*, 1 Rob. 237. † 2 Rob. 174.

and a fair profit on the commodity that is due, reference being had to the original price actually paid by the exporter, and the expenses which he has incurred. As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to these terms; but certainly the capturing nation does not always take these cargoes on the same terms on which an enemy would be content to purchase them; much less are these cases to be considered as cases of costs and damages in which all loss of possible profit is to be laid on the captor; *for these are not unjust captures, but authorised exercises of the rights of war.*"

No more exact definition of what is contraband seems to have been laid down by modern writers or by modern judicial decisions. The introduction of steam for propelling ships appears to have added two more articles to the list, viz., steam machinery and coal, the former, according to modern opinion, being, if ready for use, contraband *per se*, while coal is only *ancipitis usus*. This is recognised in the statement of the English Government, in reply to an inquiry by British merchants, "That having regard to the present state of naval armaments, coal may in many cases be rightly held to be contraband of war; and therefore that all who engage in the traffic must do so at a risk from which her Majesty's Government cannot relieve them."*

The answer is not one of law, but of fact, and can only be decided when some particular case is brought before a Prize Court. There can be no doubt that if a vessel is used as a ram, coal is as much the active agent of war as gunpowder. Lord Stowell always held pitch and tar as contraband.† But the Government of Great Britain relaxed this rule on the ground that they were the natural productions of the neutral countries.

* The Jurist, 1859, p. 203.

† *The Maria*, 1 Rob. 372.

But the question is clearly one of fact, for coal is *ancipitis usus*, and the question whether it is contraband in a particular case must be decided according to the circumstances of that case. The question to be decided is, what is the character of the port of destination? though that seems not so important in modern days, for coals could be landed at a commercial port, and owing to the rapid transit by rail, be easily conveyed to a naval port, and this by the design of the neutral trader. Another question is the war or maritime one. If it is proved as a fact in the case that the articles are destined directly to military use, then they would be condemned for the further reason of being involved in a non-neutral trade.*

In determining whether a cargo is contraband, the question is, what intention had the neutral in sending or carrying such cargo? His object is presumably to obtain the highest price he can for his commodities, not to assist either belligerent. But if it is found as a fact that the neutral is engaged in assisting a belligerent, then not only does he pay penalty for carrying contraband, viz., the loss of freight, but his vessel is liable to condemnation as engaged in an unneutral trade. The neutral claims to have his trade unfettered; the belligerent, that his enemy shall not be aided. Hence, there is a debateable ground that is invaded by either of these rival interests, according as circumstances favour the power and influence of the one or the other.

SECT. 6.—CONTRABAND PERSONS AND PAPERS.

Contraband Persons and Papers.—The question of contraband does not arise only with respect to the cargo of a vessel, but also in the case of the passengers and papers she carries.

* Wheaton's Int. Law, by Dana, note 226; 5 Jur. 203, 185.

There is this distinction, however, between the transport of hostile persons and papers in regard to the penalty inflicted by the law of nations. In the case of cargo it is presumed that the object of the neutral is commercial enterprise in order to find the best market for his goods. The penalty, therefore, imposed in general is either the confiscation of the contraband articles, depriving the vessel of the freight it would have earned by the transport of the goods, or the belligerent in other cases claims, as we have seen, the right of exercising the right of pre-emption over the goods. But in the case of a vessel captured knowingly carrying hostile persons and papers, the penalty is, as we shall see, far more severe. The rule is, that the neutral shall not intervene to aid a belligerent in his military operations, or to ward off or relieve the pressure of war which the other belligerent is exercising upon him.* It is, therefore, clear that a vessel must not engage in the trade of either belligerent, must not be taken up as a transport, or carry provisions directly to the enemy belligerent fleet or army, under the penalty of being condemned as engaged in an unneutral trade. Mr. Dana, in a note to his edition of Wheaton's International Law, after reviewing the principal decisions in the English courts, lays down the following principles, which he refers to as the principles of the English Prize courts adopted by the British Government, and which no other Prize courts have overruled, and no national acts of other States, in the way of treaties or permanent orders, have disclaimed:—

1. "If a vessel is in the actual service of the enemy as a transport she is to be condemned. In such case it is immaterial whether the enemy has got her into his service by voluntary contract, or by force or fraud. It is also in such case immaterial what is the number of the persons carried, or the quantity or character of

* Dana's Wheaton, note 228.

the cargo; and as to despatches the Court need not speculate upon their immediate military importance. It is also unimportant whether the contract, if there be one, is a regular letting to hire, giving the possession and temporary ownership to the enemy, or a simple contract of affreightment. The truth is, if the vessel is herself under the control and management of the hostile Government, so as to make that Government owner *pro tempore*, the true ground of condemnation should be as enemy's property. The interpretation of this technical phrase of Prize law will cover all such cases, and it would have saved some mistaken deductions if *The Carolina, Friendship*, and *Orozembo* had been condemned on that ground in terms."

The principal decisions on the first head are *The Carolina** (1802), in which case the vessel was captured leaving Alexandria, after having served as a transport in conveying the French forces to Egypt. The master pleaded that he had acted under duress. But Lord Stowell laid it down, "That a man cannot be permitted to aver, that he was an involuntary agent in such a transaction. If an act of force, exercised by one belligerent on a neutral ship or person is to be deemed a sufficient justification for any act done by him, contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act. *If any loss is sustained in such a service, the neutral yielding to such demands must seek redress against the Government that has imposed the restraint upon him.* He has no right to expect that the British Government should pay for the injustice of its public enemy."

* 4 Rob. 256.

The Case of The Friendship * (1807).—In this case an American vessel had made an agreement with the agent of the French Government in the United States to carry to France some eighty men, French officers and seamen, relics of the crews of wrecked French vessels, a part of the French Naval Marine, who were on their arrival to report themselves at the French Bureau of Marine for orders, and the vessel engaged to take no cargo. Lord Stowell found that the vessel was a transport engaged in the immediate military service of the enemy, and that in such case it was immaterial what was the form of the contract. The nature of the service rendered was that of a transport, and the ship was condemned. In this case, however, Lord Stowell suggested that the mere fact of a single military officer going home from a neutral country at his own expense, as other passengers, would not justify the finding.

The Orozembo † (1807).—An American vessel went from Rotterdam to Lisbon, and there took in three Dutch military officers of distinction to carry to Batavia. Lord Stowell was of opinion that she was to be considered let as a transport to the Dutch Government, and that the number of officers was immaterial; and, speaking of two civil officers also on board, Lord Stowell said:—

"Whether the principle would apply to them alone, I do not feel it necessary to determine, but it appears to me on principle to be but reasonable that wherever it is of sufficient importance to the enemy that such persons should be sent out on the public service, at the public expense, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with the hostile operations."

It does not appear that ignorance is any excuse, for, speaking of the ignorance of the master, Lord Stowell further observes:—

"It has been argued that the master was ignorant of the character of the service on which he was engaged, and that in

* 6 Rob. 420.

† 6 Rob. 430.

order to support the penalty it would be necessary that there should be some proof of delinquency in him or his owner. But I conceive *that* is not necessary; *it will be sufficient if there is an injury arising to the belligerent from the employment in which the vessel is found.* In the case of the Swedish vessel,* there was no *mens rea* in the owner or in any other person acting under his authority. The master was an involuntary agent, acting under compulsion put upon him by the officers of the French Government, and, so far as intention alone is considered, *perfectly innocent.* In the same manner, in case of *bonâ fide* ignorance, there may be no actual delinquency, *but if the service is injurious, that will give the belligerent a right to prevent the thing from being done,* or at least repeated, by enforcing the penalty of confiscation. If imposition has been practised, it operates as force, and if redress in the way of indemnification is to be sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger. If, therefore, it was the most innocent case on the part of the master, if there was nothing whatever to affect him with privity, the whole amount of the argument would be that he must seek his redress against the freighters; otherwise such opportunities of conveyance would be considerably used, and it would be almost impossible in the greater number of cases to prove the knowledge and privity of the immediate offender."

2. "If a vessel is not in the enemy's service, still if the master knowingly takes for the enemy's Government, or its agents, persons or papers of such a character and destination that the transporting of them under the neutral flag is an actual belligerent service to the State, it is an unneutral act, which forfeits the vessel. If he avers ignorance of the character of the persons

* *The Atlantic*, 4 Rob. 256, vide *supra*.

> or papers, all the circumstances are to be considered, for the purpose of determining, not only the truth of his averment, but whether his ignorance, though real, is excusable. He is bound to a high degree of diligence in such cases, and if the circumstances fairly put him on an enquiry, which he does not properly pursue, he will not be excused. Among these circumstances are: the character of the despatch, as far as shown from itself, its source, its destination, the circumstances attending its delivery or custody, and the character of the ports of departure and destination of the vessel, as being neutral or hostile."

So that where the master of a neutral vessel is found carrying hostile persons or papers, suspicion attaches to him from which it is necessary for him to clear himself. The onus being thrown on him may be seen by the following decisions :—

The Atlantic (1808).*—This was a case of a Bremen ship and cargo captured on a voyage from Batavia to Bremen, on the 14th July, 1807, having come last from the Isle of France, where a parcel containing despatches from the Government of the Isle of France to the Minister of Marine at Paris, was taken on board by the master and one of the supercargoes, and was afterwards found concealed, in the possession of the second supercargo. Lord Stowell, after stating that the despatches were found concealed, said :—

"This being the fact then, that there were on board public despatches of the enemy, not delivered up with the ship's papers, but found concealed, it is incumbent on the persons entrusted with the care of the ship and her cargo to discharge themselves from the imputation of being concerned in the knowledge and management of this transaction. It is further

* 6 Rob. 440.

laid down, that where papers and military individuals sailing as private individuals are on board they must be pointed out to the captors. If an individual is from his military character exposed to the operations of war, it is not for the master or supercargo to throw over him, from motives of compassion, or from any other inducement, a colourable protection, and not to point out to the captors that there were enemy's despatches on board amounts to a fraudulent dissimulation of a fact which, by the law of nations, he was bound to disclose to those who had a right to examine and possess themselves of all papers on board. I feel myself, therefore, bound to pronounce that there were papers received on board as public despatches, and knowingly by those who are the agents of the proprietors, and that the fact of a fraudulent concealment and suppression is most satisfactorily demonstrated. The question then is, what are the legal consequences attaching to such a criminal act, for that it is criminal, and most noxious, is scarcely denied. It is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences in the operations of the enemy. It is a service, therefore, in whatever degree it exists, that can only be considered in one character, as an act of the most noxious and hostile character. I have the direct authority of the Superior Court* for pronouncing that the carrying of the despatches of the enemy brings on the confiscation of the vehicle so employed." And as the supercargo had been engaged in the concealment, the cargo was condemned also.

In the case of *The Constantia*,† where there was no fraudulent concealment, yet as the master (also part owner of ship and cargo) had been in the custody of a British frigate for fifteen days without disclosing the fact that he was in possession of enemy's despatches, the ship and cargo were condemned;

* *The Constitution*, 14 July, 1802.

† 5 Rob. 461 note; H. L. 15 March, 1808.

so that the master of a ship is not only bound not to conceal, but to disclose. He must be active; not merely passive.

In the case of *The Susan*,* the master had been persuaded to take charge of a packet of papers and shawls that were found to contain a letter. The Court held that the master was not at liberty to aver his ignorance. He did not appear, from his own account, to have used any caution, and that the papers were not produced, as they ought to have been. That it was necessary that it should be known, that it would be considered as a proof of fraud if papers of this description, being on board, were not produced voluntarily in the first instance. The ship was condemned, but not the cargo, not even that part belonging to the owner, the master not being the agent for the cargo. But the private adventure of the master was refused, as the offence originated chiefly in the misconduct and culpable negligence of the master.

The Hope.†—The papers were shipped in the luggage of a passenger (a military officer in disguise), and were sent down to the hold. The master was not permitted to aver his ignorance; but the ship was condemned, but not the cargo, as the master was not the agent for it.

3. "It is not an unneutral intervention, entailing a penalty for a neutral, to knowingly carry a despatch of a character recognised as diplomatic in the international intercourse of States. Of this class is a despatch passing either way between the enemy's home government and its diplomatic agent in an enemy's country; and consul-generals come within the privilege of this rule."

In the case of *The Caroline* (1808).‡ This was the case of a

* Ibid. 1st April, 1808.
† H. L. 9th April, 1808. ‡ 6 Rob. 461.

ship having on board despatches from the French Minister in the United States to his own Government. Lord Stowell distinguished this from the preceding cases, on the ground that the despatch was from a diplomatic agent in a foreign neutral country. All nations have a permanent interest in maintaining diplomatic relations with each other, and ought not to be deprived of it by the fact that certain nations are at war. This implies a right of a neutral to have ambassadors from both belligerents residing at his court, as well as a right to send his ambassadors to their courts, and carries with it some right of the belligerent ambassador at the neutral court to have free communication with his own Government. Such communications are not necessarily, or by any presumption, hostile to the interests of his country's enemy. They may be so, but they may not be, and the rule is that they may be sent under the neutral flag. If the ambassador violates the neutrality of the country to which he is accredited by overt acts, or if he endeavours to draw the country into the war, the remedy must be diplomatic and political, and not by a rule allowing the capture of all despatches in neutral custody.*

In the case of *The Madison*† (1810), the carrying of belligerent despatches from a hostile port to a diplomatic agent (the Consul-general) in a neutral country was held protected.

In the case of *The Rapid* (1810),‡ where despatches were taken in ignorance by the master from a neutral port, and the voyage was to terminate at a port which was to be considered neutral, as an open trade was allowed, the plea of ignorance was admitted.

It would appear by an American decision (*The Tulip*)§ that if diplomatic despatches are placed in a private vessel of the nation with which the ambassador's nation is at war, and she is

* Dana, note to Wheaton, 228. † Edward, 224.
‡ Edward, 228. § 3 Washington's Rep. 181.

captured by a cruiser of the former nation, the despatches have no immunity. The ground of this decision appears to be that the vessel employed in carrying the enemy's despatches, though diplomatic, is to be held *pro hâc vice* enemy's property, and therefore liable to capture, with the despatches.

Private Letters.—Though it is an unneutral act to carry belligerent despatches, there is no rule of international law that prevents the neutral carrying private letters. The definition of despatches is thus given by Lord Stowell. *The Caroline* (1808) :—*

"It has been asked what are despatches, to which I think that the answer may safely be returned, that they are all official communications of official persons on the public affairs of the Government. The comparative importance of the particular papers is immaterial; it is sufficient that they relate to the public business of the enemy, be it great or small. If understood to be papers coming from official persons, and addressed to persons in authority, and they turn out to be mere private letters, it will be well for them, and they will have the benefit of so fortunate an event. But if the papers so taken relate to public concerns, be they great or small, civil or military, the Court will not split hairs and consider their relative importance with regard to the caution that it is incumbent on a neutral master to show on taking charge of papers." And again Lord Stowell says†:—"I should be unwilling to lay down a rule that would deter masters of vessels from receiving on board any private letters because they do not know what they may contain. But it must be understood, that where a party, from want of proper caution, suffers despatches to be conveyed on board his vessel, the plea of ignorance will not avail him. His caution must be proportioned to the circumstances under which such papers are received. When a neutral master receives papers on board in a

* 6 Rob. 461. † *The Rapid*, Edward, 228.

hostile port, he receives them at his own hazard, and cannot be heard to aver his ignorance of a fact which by due enquiry he might have made himself acquainted with."

This dictum that a neutral master's caution must be proportioned to the circumstances under which such papers are received, Mr. Dana says, "gives the key to the rule." It therefore appears that where a neutral vessel is found carrying belligerent despatches concealed as private letters the onus is on the master, of proving to the satisfaction of the Prize Court that he took the papers as *bonâ fide* private letters, under circumstances which did not or ought not to have excited his suspicion that they were otherwise.

Postal Vessels and Mail Bags.—It appears by the treaty of 1848, between the United States and Great Britain, it is provided that in the case of war between the two nations, the mail packets shall be unmolested for six weeks after notice by either Government that the service is to be discontinued, in which case they shall have safe conduct to return ; but this provision does not appear to exist between other nations.* In the case of neutral mail packets, there seems to be a growing demand on the part of neutral nations that in the case of public mails duly authenticated, and in the case of private lines, like the Cunard or Peninsular and Oriental, and other lines, subsidized by different Governments for that purpose, which have a Government mail agent on board, should be exempted from search. The danger arising from this immunity is that the neutrals might carry all contraband despatches without danger of detection, and, even if desirous of acting *bonâ fide*, there can be no public guarantee of the innocent character of the contents of the mail. "It is well understood that the postal officers usually know or notice little or nothing of the externals of the letters and packets in the mail, and know nothing of their contents. There is no rule by which the Government undertakes to be answer-

* See Dana, note 228.

able for the neutral and innoxious character of the contents of the mails, or authorise or require their agents to make search beforehand, and to refuse objectionable matter." *

The immunity of Government mails is, therefore, one of the problems of international law that has yet to be solved. This has already been established by Lord Stowell, in the case of the Swedish convoy,† that public neutral custody is not such a guarantee as will exclude belligerent search, especially in cases like that of mail service, where the Admiralty mail agent must be, from the nature of the service, unable to say one word as to the contents of the mail-bags under his charge.

The Trent.—This case, which occurred during the late civil war in America, and was nearly the occasion of hostilities between Great Britain and that country, is chiefly remarkable for the points of international law raised in the arguments of the respective Governments. The facts shortly were these: In October, 1861, the Southern States of America appointed Mr. Mason ambassador to Great Britain, and Mr. Slidell to France. The ports of these States being then blockaded, these gentlemen succeeded in reaching Havana, a neutral port. Thence they took a passage in *The Trent* to Nassau, another neutral port, *en route* for Europe. *The Trent* was a regular mail steamer plying between these ports, and carrying the mails and all passengers who desired to embark, so that the transport of these particular persons could not be said to be the occasion of the voyage. *The Trent* was stopped by the United States steamer *San Jacinto,* Captain Wilkes. The commander of *The Trent* denied the right of search, and refused all facilities for it, and made it known that he only yielded to superior power, and that if made a prize he and his crew would lend no aid in carrying *The Trent* into port. Messrs. Mason and Slidell and suite were

* Dana.

† *The Maria,* 1 Rob. 340; vide *supra,* p. 65.

removed under protest from *The Trent*, who was permitted to proceed on her passage. To the demand made by England for the restitution of these persons, the American Government restored them, on the ground that the only duty a cruiser has to perform is either to permit a vessel to proceed on her passage intact, or to make a prize of her, and send her in for adjudication, and denied that there is any right *jure gentium* of taking contraband persons out of a neutral vessel, and that therefore prisoners were restored. Lord Russell, on the part of Great Britain, reviewing the letter of Mr. Seward, said that Messrs. Slidell and Mason were not contraband; and, secondly, that *The Trent* was not liable to be condemned as a prize, since her passage was between neutral ports.

It does not appear, therefore, that the case of *The Trent* settled any principle. The ground of claim was that the persons were not contraband. The ground of restitution was, that the question of their being contraband or not was not for the captor to determine; he ought either to have sent the vessel in for adjudication, or allowed her to proceed intact. So that the question, what are the rights of belligerents over contraband persons and papers in innocent neutral ships, has yet to be determined.

There is no doubt that it may often happen that a neutral vessel may be innocently carrying military persons or despatches, as in the case that Lord Stowell puts of a military officer returning home at his own expense, and as a private passenger; or in the case of despatches, as in the affair of *The Rapid*.* A despatch may be given to a neutral as a private letter when he is sailing between neutral ports. What are the rights of a belligerent? It is clear by the common law of nations that a belligerent is entitled to the possession of hostile persons or papers, if he can seize them, and this right is not only granted by the common consent of mankind, but it arises *ex necessitate*, and the only limit to this right of seizure is the protection

* Edward, 228, *et supra*, pp. 88, 89.

afforded by neutral territory. The belligerent therefore has a right to the possession of contraband persons and papers, provided they are not under the protection of neutral territory. Now that a neutral vessel is not neutral territory is a rule of international law admitted by all writers on international law. This being the case, the common law of nations clearly gives a belligerent a right to the possession of contraband persons and papers, and this right is irrespective of the fact whether they are on board a neutral or enemy's vessel, whether the neutral vessel is innocent or guilty, whether she is trading between belligerent or between neutral. Neither of these facts can interfere with the right of the belligerent to possess himself of the persons and papers, though it may affect the mode; and therefore the contention of the part of England in the case of *The Trent*, that the Americans were wrong because the vessel was sailing between two neutral ports would appear idle, if the other contention, that the prisoners were contraband of war, were admitted. In the case of *The Rapid*,* the suggestion was never made that she was a vessel sailing between neutral ports. The port of destination in that case being admitted by Lord Stowell to be the same as neutral, and in this case it was not whether the papers were liable to seizure, but whether the ship was to be condemned. It being then granted that the belligerent is entitled to the possession, the question becomes, in what mode is it to be effected? According to the American view; only, by sending in an innocent vessel for condemnation as a prize, in order that she may be ordered to be restored, and probably the captor may be condemned in costs; this view being supported by analogy to the case of contraband cargo; but in the case of cargo the master is presumed to know its nature and character, and, therefore, even if he is ignorant of its being contraband, his ignorance is no excuse; so that in the case of a contraband cargo the master is necessarily

* Edward, 228, *supra*.

particeps criminis, and is therefore liable to the annoyance and loss of being sent in for adjudication. Not so in the case of contraband persons or papers. We have seen here that ignorance of the real character may excuse the vessel. But Mr. Dana also contends, "that it is the settled policy of nations to prohibit all acts of force on neutral vessels done at the discretion of the belligerent officer, and which look to no subsequent judicial determination, and that, therefore, the modern policy of nations does not sanction the act of removal." * The fact is, that in the case of contraband persons the supposed rights of hospitality come into play, and the neutral refuses to deliver up his guest, forgetting that the belligerent, who, knowing that by his occupation and profession, he renders the neutral vessel liable to the risk of capture and condemnation, fraudulently conceals his true character, is in reality entitled to no consideration. But if the modern rule should follow the view of the Americans, apparently it would only remove the right of the belligerent one step and introduce another link into the chain. The belligerent in such a case should notify to the neutral vessel their true character, and demand that they should be given up without protest; and if that was refused, then the neutral vessel would lose her innocent character by persistently carrying contraband persons and papers, and might be safely sent in for adjudication as a prize. It must be remembered that the case of a neutral vessel *innocently* carrying contraband persons or papers has never been the subject of a direct decision. The text expresses the opinion of the author on the subject, but the question is still an open one.

SECT. 7.—BLOCKADE.

Nature of Blockade.—One of the duties imposed upon neutral vessels is to respect the blockaders of either belli-

* Dana's Wheaton, note 228.

gerent. By the law of nations, as now recognised, a belligerent has a right to invest the ports of his enemy by sea as well as he has to lay siege to his towns by land; and not only in the case of naval stations or military ports, but also in the case of purely commercial ports, instituted for the purpose of merely closing them against trade, and not with any hope or intention of actually reducing or capturing the place. "A blockade," says Lord Stowell,* "is a sort of circumvallation round a place, by which all foreign connexion and correspondence is, as far as human force can effect it, to be entirely cut off; and a blockade is as much violated by a vessel passing outwards as inwards. It is intended to suspend the entire commerce of that place, and a neutral is no more at liberty to assist the traffic of exportation than of importation."†

Violation of Blockade.—"On the question of blockade, three things must be proved."‡

1st. The evidence of an actual blockade.

2nd. The knowledge of the party.

3rd. Some act of violation, either by going in or by coming out with a cargo laden after the commencement of the blockade.

I. *Actual Blockade.*—Although, as we have seen, the modern rules of international law secure to neutral nations the right to carry on their accustomed trade, yet the ancient practice appears to have been for a belligerent power to prohibit all trade with an enemy. On the outbreak of war proclamations were issued warning all persons not to attempt to import victuals or other merchandise into the enemy's territory; and therefore the vessels and merchandise of any who might contravene such warning were arrested and confiscated as the property of parties adhering to the enemy.§ This practice, however, towards the close of the

* *The Vrouw-Judith*, 1 Rob. 151. † *The Frederich Molke*, 1 Rob. 87.

‡ Per Lord Stowell, *The Betsey*, 1 Rob. 93.

§ Twiss's Law of Nations, *War*, s. Blockade.

seventeenth century became generally reprobated as an immoderate exercise of belligerent right, and gradually fell into desuetude; and the right to intercept merchant vessels trading with an enemy's ports was only permitted to be exercised where a blockade of the ports actually existed, and was carried on by an adequate force, and not merely declared by proclamation; such actual investment, in the opinion of Grotius and others, being required to render commercial intercourse with the port or place unlawful on the part of neutrals.*

Mr. Halleck says:†—"A constructive, or, as it is sometimes called, *a paper blockade*, is one established by proclamation without the actual presence of an adequate force to prevent the entrance of neutral vessels into the port or ports so pretended to be blockaded. In other words, it is an attempt on the part of one belligerent, by mere proclamation, and without possessing, or if possessing without using, the means of establishing a real blockade, to close the port or ports of the opposite belligerent to neutral commerce. Can such prohibitions or paper blockades render criminal the entrance of neutral vessels into ports so proclaimed to be, but not actually blockaded? If so, a mere paper proclamation is equally as efficacious in war as the largest and most powerful fleets."

And Lord Stowell says:‡—"A blockade may exist without a public declaration; although a declaration unsupported by fact will not be sufficient to establish it." And in the case of *The Betsey*,§ where it was stated that "on the 1st of January, after a general proclamation to the French Islands, they are put into a state of *complete* blockade," Lord Stowell said:—"The Lords of Appeal have determined that such a proclamation was not in itself sufficient to constitute a legal blockade. * * * I

* Wheaton's Int. Law, s. 509.

† Halleck's Int. Law, ch. xxiii. s. 6. See authorities cited.

‡ *The Mercurius*, 1 Rob. p. 82.

§ 1 Rob. 94.

think we must infer that there was not that actual blockade which the law is now distinctly understood to require."

And this proposition is now effectually confirmed by the fourth article of the Declaration of Paris of 1856, which says that

> Blockades, in order to be binding, must be effective; that is to say, maintained *by a force sufficient really to prevent access to the coast of the enemy.*

Mr. Dana* objects to this definition as being unscientific, and in its literal sense requiring an impossibility. But from the various authorities that learned author refers to, it seems that it was not intended that ingress and egress should be made impossible, but that the blockade should not be a nominal or paper blockade, but be practically and reasonably effective.†

It is on this ground that neutral nations will not permit a State to blockade any of its ports, where they are in the hands of insurgents, by proclamation only, under the pretence of municipal surveillance.‡

Blockade must be Universal. — As a corollary to the rule that blockades must be effective, is the rule that they must be universal. In *The Rolla*,§ Lord Stowell says, "That if a blockade is irregularly maintained by the blockading forces, by suffering some ships to go in and others to come out, I should be disposed to admit the conclusion that such a mode of keeping up, or rather retaining the blockade, would altogether destroy the effect of it. For what is blockade but a uniform universal exclusion of all vessels not privileged by law. If it was shown, therefore, that ships not *privileged* by law have been allowed to enter or come out, from motives of civility or other considerations, I should be disposed to admit that other parties

* Dana, Wheaton, note 233.

† Earl Russell to Mr. Mason, Feb. 17, 1863; Parliamentary Papers, 1863.

‡ Dana, note 323; Wheaton's Int. Law.

§ 6 Rob. 372.

would be justified in presuming that the blockade had been taken off." And in the case of *The Juffrow Maria Schroeder*,* Lord Stowell says: "I cannot shut my eyes to a fact that presses upon the Court, that the blockade has not been duly carried into effect. What is a blockade, but to prevent access by force? If the ships stationed on the spot to keep up the blockade will not use their force for that purpose, it is impossible for a court of justice to say that there was a blockade actually existing at that time so as to bind this vessel." In this case neutral ships had been permitted to enter with impunity. In the case of *The Henricus Draik*,† the neutral vessel was allowed to enter with a cargo of coals, and was captured leaving. The Court held that "the permission to go in with a cargo included permission to that ship to come out with a cargo." And in the case of *The Fox* and others,‡ Lord Stowell said,—"That a blockade which excludes the subjects of all other countries from trading with the ports of the enemy, and at the same time permits any access to those ports to the subjects of the State which imposes it, is irregular, illegal, and null; and I agree, that a blockade imposed for the purpose of obtaining a commercial monopoly for the private advantage of the State which lays on such blockade, is illegal and void, on the very principles upon which it is founded."

Lord Stowell, however, seems to suggest that the nation might grant particular licences to trade with a blockaded port. But in *The Success*,§ that Judge lays it down that "a blockade must operate to the exclusion of British as well as neutral ships; for it would be a gross violation of neutral rights to prohibit their trade and to permit the subjects of this country to carry on an unexcluded commerce at the very same ports from which neutrals are excluded, and thus to convert the blockade into a mere instrument of commercial monopoly."

* 3 Rob. 147. † Ibid. in notis. ‡ 1 Edw. 320.
§ 1 Edw. 320; 1 Dods. 134.

And in *The Franciska,** the English Courts have laid it down, that—

Relaxation of blockade in favour of belligerents to the exclusion of neutrals, is illegal.

Blockade is not effective though the relaxation is granted to neutrals.

The reason for this latter decision being, that where a belligerent claims the right to blockade a port, he has no right to grant a particular relaxation, which may be of the greatest value to himself or his subjects, but of little or no value to the neutral. "That a belligerent, if he inflicts upon neutrals the inconvenience of exclusion from commerce with a port, must submit to the same inconvenience himself; and that he is not to be at liberty to select particular points in which it suits his purpose that the blockade should be violated with impunity, unless each neutral, in order to be placed on equal terms with the belligerent, is at liberty to make a similar selection for himself. If this be done, it amounts to a general freedom of commerce inconsistent with the existence of any blockade at all. A blockade would not, however, be rendered invalid by allowing fixed periods of time, according to modern usage, for vessels in the port, or destined to the port before the establishment of the blockade, to enter or come out, or to allow the passage of neutral vessels of war, or despatch vessels under neutral sovereignty." †

Interruption to a Blockade.—Though, as a general rule, the

* Moore's Pri. Cas. p. 53.

† Moore's Pri. Cas. p. 57; see Dana, Wheaton's Int. Law, note 233. A licence to trade is opposed to the very nature of a blockade. A blockading force makes its appearance as an enemy, not to promote a commercial policy. The act of blockade, like all other acts of war, is a rude, stern reality. And neutral nations have a right to expect that the work be vigorously and promptly executed, not that they be compelled to stand idly by while the cat plays with her mouse.

actual presence of an adequate force is necessary to constitute a blockade, yet this rule is not broken by the occasional temporary absence of the blockading squadron produced by accident, as in the case of a storm, nor is the legal operation of the blockade thereby suspended.* And Lord Stowell, in *The Columbia*,† says,—"The law considers an attempt to take advantage of such an accidental removal as an attempt to break the blockade, and as a mere fraud."

This view of the law, which is adopted by both the English and American authorities,‡ is opposed to the view adopted by the French authorities, who lay it down that an interruption ends a blockade, and that the latter, to be reconstituted, requires a new inception and notice. But as Mr. Dana observes, the view taken by the former authorities is a practical one, that by the latter is only a formal and fanciful theory.§

A blockade is not considered raised where the communication may be left open by the ships of the squadron being employed in chase of suspicious vessels who had approached the blockaded port.‖ But where the ships of the blockading squadron are removed and an inadequate force left behind it was held, in the case of *The Nancy*,** that the blockade must be considered to be raised. It was, however, held on appeal from the Vice-Admiralty Court, when the vessel was ordered to be restored by Sir M. Grant,—"That as it appeared that the force left behind was sufficient, that the vessel was to be condemned." The test, however, of the sufficiency was held to be the opinion of the naval officer on the station, which would seem to be making him the judge of his own case.

Superior Force. — But where the blockading squadron is driven off by a superior force the interruption operates as

* Wheaton's Int. Law, s. 514. † 1 Rob. 156.
‡ Dana, Wheaton, note 233 ; Lord Russell to Mr. Mason, 10 Feb. 1863.
§ Hautefeuille, tom. iii. p. 120 ; Ortolan, tom. ii. p. 311.
‖ *The Eagle*, 1 Act. Rep. 65. ** 1 Act. Rep. 59.

a legal discontinuance of the blockade, and on its renewal, the same measures are necessary to bring it to the knowledge of neutrals, either by public declaration or by the notoriety of the fact, as were legally requisite when it was first established.

In the case of *The Tribeten*,* Lord Stowell said,—that "as is was notorious that the British squadron had been driven off by a superior force, it must be shown that the actual blockade was again resumed." And, in *The Hoffnung*,† that Judge laid it down,—"That a neutral was not bound to presume that a blockading squadron would return after being driven off by a hostile force, *as he was bound to presume where it was driven off by adverse winds.* In the former case the neutral merchant is not bound to foresee or conjecture that the blockade will be resumed."

In the American Courts it has been held, that the accidental dispersion of a blockading squadron does not raise the blockade where the *animus revertendi* is preserved; but that the withdrawing the blockading squadron for other hostile purposes, however temporary, does.‡

II. *The Knowledge of the Party.*—The breach of a blockade is viewed in all cases as a criminal act. Such being the case, it necessarily follows to constitute the offence that a knowledge of the existence of the blockade and an intention to violate it are proved.§ Not only must an actual blockade exist, but a knowledge of it must be brought home to the party, in order to show that it has been violated.

The decisions of the various courts on this point, and the rules of the various authors on international law, show that

* Halleck's Int. Law, ch. xxiii. s. 11; 6 Rob. 65.

† 6 Rob. 117.

‡ *Williams* v. *Smith*, 2 Caine's Rep. 1, and *Radcliff* v. *Un. Ins. C.*; 7 Johns. Rep. 38; *S. C.*, 9 Johns. Rep. 277.

§ Halleck, c. xxiii. s. 16.

in order to fix the neutral with violation of a blockade, it must be proved, either—

1st. That he actually knew of the blockade, the sources of his information being immaterial;

or, 2nd. That the blockade has been duly notified to his Government, which is presumed to be notification to him;

or, 3rd. That the blockade is of such common notoriety as to fix him with presumed knowledge.

I. *Actual Knowledge.*—"It is obvious that as all questions of International Right presume good faith, a knowledge of the fact of a blockade, howsoever acquired, will preclude a neutral master from any claim to receive a direct warning from the blockading squadron, even if the vessel should have sailed from the port where she had shipped her cargo without a knowledge of the blockade."*

And this rule is inflexibly applied, even where by treaty, or by the terms of the notification of the blockade, it is necessary to give notice to vessels approaching the blockaded port. It was so determined by Lord Stowell in the case of the *Columbia*:†—"But it is said that by the *American treaty there must be a previous warning;* ‡ certainly where vessels sail without a knowledge of the blockade a notice is necessary, but if you can affect them with the knowledge of that fact a

* Twiss's Law of Nations, *War*, s. 104. See *The Franciska*, 2 Spinks's Eccl. & Ad. Rep. p. 113; *S. C.*, 10 Moo. Pr. Cas. 58; Panaghia, 12 Moo. Pr. Cas. 168.

† 1 Rob. 154.

‡ By the treaty of 19th Nov. 1794, a vessel ignorant of a blockade must be turned away, and could not be detained, nor her cargo, unless contraband, confiscated, unless after notice.

warning then becomes an idle ceremony, of no use, and therefore not to be required." * So in the case of the late American civil war, the proclamation of blockade by the United States (19th April, 1861) had this clause:—"If therefore, with a view to violate such blockade, a vessel shall approach, or shall attempt to leave any of the said ports, she will be duly warned by the commander of one of the blockading vessels, who will endorse on her register the fact and date of such warning; and if the same vessel shall attempt to enter or leave the blockaded port, she will be captured." On this it was contended that all vessels were entitled to one warning, and none but second comers could be condemned. But it was decided in the District Courts that it was sufficient if the knowledge could be brought home to the vessel either by proof of the previous warning named in the proclamation, or by the direct proofs or presumptions allowed by the law of nations in such cases; as notoriety at the port of departure.† This interpretation of the proclamation was sustained in the Supreme Court on appeal, on the ground that the warning "was intended for the benefit of the innocent, not the guilty;" and that it would be absurd to warn vessels who had a full previous knowledge.‡

And in *The Franciska*,§ the Lords of Appeal said:—"While their Lordships are prepared to hold that the existence and extent of a blockade may be so well and so generally known, *that knowledge of it may be presumed without distinct proof of personal knowledge*, and that knowledge so acquired may supply the place of a direct communication from the blockading squadron; yet the fact with notice of which the individual is to be fixed must be one which admits of no reasonable doubt." Any communication which brings it to the knowledge of the party

* And see *Fitzsimmons* v. *The Newport Ins. C.*, 4 Cranch, 185.
† Dana, Wheaton, note 235. See cases cited therein.
‡ Ibid. per Judge Grice, Prize Causes, 11 Black, 635.
§ 10 Moore's Pr. Cas. 58.

(to use the language of Lord Stowell in the *Rolla*—6 Rob. p. 367) in a way which could leave no doubt in his mind as to the authenticity of the information, will be binding on him.

II. *Notification to the Neutral Government.*—It has been held by the English Courts of Admiralty that the notification of a blockade to a neutral Government is by construction of law a direct personal notice to each inhabitant of that country; and that he cannot be allowed to aver his own ignorance of the blockade, or otherwise contradict the legal presumption of knowledge.*

In *The Neptunus* (1) † Lord Stowell says:—"There are two sorts of blockade—one by *simple fact* only, the other by a notification accompanied with the fact." And in the case of *The Neptunus* (2) ‡ he says:—"The effect of notification to any foreign Government would clearly be to include all the individuals of that nation: it would be the most nugatory thing in the world if individuals were allowed to plead their ignorance of it. It is the duty of foreign Governments to communicate the information to their subjects, whose interest they are bound to protect. I shall hold, therefore, that a neutral master can never be heard to aver against a notification of blockade that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own Government, and may raise a claim of compensation from them, but it can be no plea in the Court of a belligerent. In the case of a blockade *de facto* only it may be otherwise, but this is a case of a blockade by notification."

Time for Communication.—In *The Jonge Petronella*,§ it was, however, held, that the lapse of a week after notification to a neutral Government, was not sufficient to affect the parties with legal knowledge of the blockade.

Practice of the French Courts.—It appears that the French

* Hallcck's Int. Law, ch. xxiii. s. 17.
† 1 Rob. 170. ‡ 2 Rob. 110. § 2 Rob. 131.

Courts are more lenient than the English and American with respect to direct warning. For the French hold that a diplomatic notice is not sufficient to charge the parties with knowledge. That the cruisers of that nation are instructed to give actual notice on the spot to all vessels approaching a blockaded port, even though the blockade has been notified to the Government of the vessel.*

III. *General Notoriety.*—In addition to the official notification of a blockade to the Government of the neutral, other sources of information are open to him; and in some cases, the inference of knowledge raised is so strong, that he is not permitted to rebut it; in others, the presumption is not conclusive against him, but he is permitted to prove his ignorance, and the captor must judge from the circumstances of each case whether the neutral vessel acted in good faith, and was really ignorant of the blockade, or whether the alleged ignorance was not assumed. "Thus, if a vessel is destined to a blockaded port, and there is clear and positive proof that the fact of the blockade was generally known at the port of her departure when she sailed, neither the master, nor the owners of the vessel, nor the shippers of the goods, will be permitted to aver their personal ignorance of that which it is scarcely possible they should not have known, or at any rate, by due enquiry might have ascertained. To allow proofs of personal ignorance in such a case, by admitting the affidavits of the master or his crew, would be a direct incitative to perjury and fraud."† Evidence of this notoriety would be the publication of the fact in the newspapers of the place of departure.‡

So where the neutral vessel is in the blockaded port at the

* See letter of M. Mole, 17 May, 1838, in relation to the French blockade of Vera Cruz; and see Twiss's Law of Nations, *War*, s. 107; Halleck's Int. Law, ch. xxiii. s. 18; Hautefeuille, Des Nations Neutres, lib. 9, ch. 5, ss. 1, 2; Ortolan, Diplomatie de la Mer, tom. ii. ch. 9.

† *The Hare*, 1 Act. Rep. 261; Halleck's Int. Law, ch. xxiii. s. 29.

‡ Ibid.

time of blockade, although she is in ignorance of any notification addressed to her Government, yet the master is not permitted to plead ignorance of the existence of the blockade. In *The Vrouw Judith*,* Lord Stowell says,—"Vessels going in are entitled to a notice before they can be justly liable to the consequences of breaking a blockade; but I take it to be quite otherwise with vessels coming out of the port which is the object of the blockade; there no notice is necessary, after the blockade has existed *de facto* for any length of time; the continued fact is itself a sufficient notice. It is impossible for those within to be ignorant of the forcible suspension of their commerce. The notoriety of the thing supersedes the necessity of particular notice to each ship."

And in *The Frederich Molke*,† it is laid down that a ship in all cases coming out of a blockaded port is liable to seizure, and to obtain release, the claimant will be required to give a very satisfactory proof of the innocency of his intentions.

So, although there has been no notification to the particular Government of the neutral, yet his knowledge will be presumed after the lapse of a reasonable time. In the *Adelaide*,‡ the Court laid it down that "a notification, if made to the principal States of Europe, would, after a time, affect the other States, not so much *proprio rigore*, or by notice of the direct act, as in the way of evidence. And this blockade being a subject of general notoriety, it is impossible that it should not have come to the knowledge of this man, and it is not to be said by any person, 'Although I know a blockade exists, yet because it has not been notified to my Court, I will carry out a cargo.'"

III. *Acts of Violation.*—The crime of violating a blockade being only an offence against the law of nations, and the only penalty imposed being, as we shall see, the right to capture and confiscate the property taken *in delicto*, it follows that

* 1 Rob. 152.

† 1 Rob. 86. ‡ 2 Rob. p. 110, in notis.

there must be more than a mere intention—there must be some act done in order to complete the offence. Lord Stowell, in *The Betsey*,* says that some act of violation must be proved.

The object of a blockade being that all foreign connexion and correspondence with the blockaded port is to be entirely cut off,† a neutral, who by any act attempts to put himself in connexion and correspondence with such a port, is guilty of the unneutral act of violating a blockade.

There are two ways in which this attempt may be made, —either by entry or departure.

And, first, as to entry.

Violation by Entry.—Although the law of nations does not admit of the condemnation of a neutral vessel for the mere intention to enter a blockaded port unconnected with any fact,‡ yet the English and American Courts have decided "that the fact of sailing for a blockaded port, knowing it to be blockaded, is an attempt to enter such port, and therefore, from the very commencement of its voyage, the vessel is *in delicto*, and liable to be punished." Mr. Halleck says,§ "An actual entrance into a blockaded port is by no means necessary to render a neutral ship guilty of a violation of the blockade. It is the attempt to commit the offence which, in the judgment of the law, constitutes the crime. If the vessel knows of the blockade before she begins her voyage, the offence is complete the moment she quits her port of departure. If that knowledge is communicated to her during the voyage, its continued prosecution involves the crime and justifies the penalty. If it is not given to her till she reaches the blockading squadron, she must immediately retire, or she is made liable to confiscation."

* 1 Rob. 92 (*a*).
† Per Lord Stowell, *The Vrouw Judith*, 1 Rob. 157.
‡ Wheaton's Int. Law, ch. iv. s. 517.
§ Int. Law, ch. xxiii. s. 23.

Conduct of the Master on being Warned.—It being the duty of a neutral vessel to abstain from the prosecution of her voyage, a great deal turns upon the conduct of the master when warned.

And, first, as to his statements:—

Declaration of an Intention to Proceed.—In the case of *The Apollo*,* Lord Stowell said that "it was not the disposition of the Court to take advantage of any hasty expressions used in the moment of surprise, and would not press a foolish declaration to the disadvantage of the master. But if the mind of the Court was convinced that the master was persisting in a serious determination, the captor is not bound to wait till he proceeds to carry his design into execution." This decision, however, appears to contravene the rule of international law, that a neutral vessel is not to be condemned for mere intention to violate a blockade. Up to the time of being warned no offence has been committed, where then is the *act* necessary to constitute the offence? Mere statements, however persistent, are not acts. Doubt, therefore, has been thrown upon this decision by the American authors,† and the Supreme Court of Pennsylvania have clearly decided that the declarations of the master, however positive and unequivocal, are merely evidences of intention, which, unless followed by some voluntary act, after his release, can never constitute the offence to which alone the penalty attaches.‡

Failure to alter Course.—But although it would appear that mere statements are not sufficient to constitute the offence, yet, as Lord Stowell says in the Apollo,§ "The master is bound on the first notice to take himself out of an equivocal situation; and if he obstinately refuses and neglects to do so, such conduct will amount to a breach of the blockade. If the Court was to admit that a master might lie to, and call a council of his own

* 5 Rob. 289.

† Halleck, ch. xxiii. s. 29.

‡ Ibid., see cases cited.

§ 5 Rob. 290.

thoughts, or of those of his crew, in the neighbourhood of the blockaded port, the rights of blockade could no longer exist to any purpose; he would stay in all cases until an opportunity offered of slipping into the interdicted port, and the blockading force would be bound to stay by him and wait for the result of his deliberations in the suspected place. The master's first duty is obvious, *fuge litus;* the neighbourhood is, at all events, to be avoided."

It therefore follows that a neutral master "is bound to manifest by his immediate acts his determination to obey the warning he has received. A very short delay, an interval of probably less than an hour will enable the belligerent to determine whether the master is pursuing the course he is bound to observe, or whether the temporary detention may not lawfully be followed by a final capture."*

Continuing Voyage after Warning.—It of course follows that if the master persists in his voyage, no excuse is admitted. In *The Shepherdess,*† the master set up as an excuse that he only persisted in his course because he was intoxicated. But Lord Stowell said, "that if such an excuse could be admitted, there would be eternal carousings in every instance of blockade."

Conditional Voyage to a Blockaded Port.—The act of sailing for a blockaded port being in general sufficient to constitute the offence, as a rule the Courts look with great suspicion upon a voyage to a blockaded port, with the intention of enquiring into the existence of the blockade. It is evident that the object of blockades would be considerably weakened if neutral vessels could sail to them with impunity, under the pretence of enquiring whether the blockade was still in existence. In the *Spes* and *Irene,*‡ Lord Stowell said,—"The neutral merchant is not to speculate upon the greater or less probability of the

* Halleck, ch. xxiii. s. 30; *Fitzsimmons* v. *Newport Ins. Co.*, 4 Cranch, 185.
† 5 Rob. 262. ‡ 5 Rob. 80.

termination of a blockade, to send his vessels to the very mouth of the river, and say, 'If you do not meet with a blockading force, enter; if you do, ask for a warning, and proceed elsewhere.' Who does not at once perceive the frauds to which such a rule would be introductory?"

But where a neutral vessel clears for a blockaded port, and express and definite instructions are given to the master not to proceed to such port before enquiring at a safe and permitted place into the existence of the blockade, then the offence is not committed until after warning and persistence in voyage. In *The Betsey*,* Lord Stowell said that the enquiry should not be made at the blockaded port, or of the blockading vessels, but in the ports that lie in the way, and which can furnish information without furnishing opportunities of fraud.†

Where, however, it appeared that a neutral master sailed to a blockaded port after notification, so that if he had been taken, he would have been taken *in delicto*, and he fell in with an English fleet, of whom he enquired whether the port was under blockade, and was told no, which information was not correct, Lord Stowell laid it down that from the moment of receiving the information, the neutral master ceased to be *in delicto*. Though the fleet had no authority to authorise a man to go to a blockaded port, yet the intelligence *bonâ fide* arising from such a source, afforded the master a reasonable ground of belief which excused his proceeding.‡

Expiration of Blockade.—A neutral master will not be allowed to aver that he presumed the blockade had expired. Where the blockade is *de facto* it expires *de facto*, but where it has been notified to the neutral Government, a neutral vessel who sails to a port (notwithstanding the time that may

* 1 Rob. 334.

† See *The Posten*, 1 Rob. 335, in notis; *The Little William*, 1 Act. 151.

‡ *The Neptunus*, 2 Rob. 114.

have elapsed since the notification) clearly does so at his own peril.

In the case of *The Vrow Johanna*,* the ship and cargo were condemned, though six months had elapsed. It was held, —"That as it was the duty of the country notifying a blockade to notify the revocation also, unless there was such revocation notified the blockade must be presumed to exist.†"

Approach; Evidence of Attempt.—In addition to the positive evidence that is offered of the illegal destination of a neutral vessel by the inspection of her documents, and the statements of the master, evidence is often deduced from the propinquity of the neutral vessel to the blockaded port. Neutral vessels are not permitted to place themselves in a situation that would enable them to violate a blockade at their pleasure.

In *The Neutralitet*,‡ Lord Stowell says,—"If the belligerent country has a right to impose a blockade, it must be justified in the necessary means of enforcing that right; and if a vessel could, under the pretence of going further, approach *cy pres*, close up to the blockaded port, so as to be enabled to slip in without obstruction, it would be impossible that any blockade could be maintained. It would be no unfair rule of evidence to hold as a presumption *de jure*, that she goes there with the intention of breaking the blockade, and if such an inference may possibly operate with severity in particular cases, where the parties are innocent in their intentions, it is a severity necessarily connected with the rules of evidence, and essential to the effectual exercise of this right of war."

In the cases cited below,§ Lord Stowell refused to permit the excuse that the neutral vessel only drew near the blockaded

* 2 Rob. 109.

† And see *The Neptunus*, 1 Rob. 170.

‡ 6 Rob. 35.

§ *The Neutralitet*, 6 Rob. 30; *The Gute Erwartung*, 6 Rob. 182; *The Charlotte Christine*, 6 Rob. 103; *The Arthur*, 1 Edw. 202. See also Wheaton's Int. Law, part iv. s. 520; Bynkershoek, Quæst. Jur. Pub. lib. i. c. 11.

port for the purpose of taking on board a pilot for another port.

Actual Entrance.—Actual entrance into a blockaded port with knowledge can only be justified by the act being done under a special licence, or from necessity.

Licences.—"A licence expressed in general terms to authorise a ship to sail from any port with a cargo will not authorise her to sail from a blockaded port with a cargo taken in there. To exempt a blockaded port from the restrictions incident to a state of blockade, it must be specially designated with such an exemption in the licence; otherwise a blockaded port shall be taken as an exception to the general description in the licence."*

Dr. Twiss,† however, considers that licences are to be favourably construed, and refers to the decisions of Lord Stowell,‡ who refused to press the letter of them too rigorously.

Licences, however, will in all probability cease to be issued for entrance to blockaded ports, the decision of the Lords of Appeal in *The Franciska* § tending to show that by granting them the blockading Government destroys the validity of the blockade.

Entrance through Necessity.—Where there is an imperative and overruling compulsion to enter a particular port under blockade, as by stress of weather, &c., the necessity will excuse the neutral master from the charge of having violated the blockade.‖ But nothing short of this imperative necessity will be admitted as an excuse. It was the practice of Lord Stowell to refer the question of necessity to the Trinity Masters; and according to their finding of the necessity that the vessel was in

* *The Byfield*, Edw. 190.
† Twiss, Law of Nations, *War*, s. 3.
‡ *The Juno*, 2 Rob. 116; *The Hoffnung*, 2 Rob. 162.
§ Moore's Pr. Cas. 59, vide *supra*, p. 98.
‖ *The Fortuna*, 5 Rob. 27.

to hold that the master was or was not justified in seeking the blockaded port.*

A vessel has no right to go to a blockaded port to bring away previously-acquired property.†

Violation of Blockade by Departure.—It is clearly settled that a neutral vessel may violate a blockade by quitting a blockaded port as by entering it. There is this difference, however. A neutral vessel is permitted to leave a blockaded port under certain circumstances, and she will not in general be guilty of violation of the blockade unless she has purchased or shipped goods in the blockaded port after she has received notice of the blockade, and thereby defeated the object of the blockaders, of cutting off all connexion and commerce with the port.

In the case of a vessel entering a blockaded port the presumption is that she entered for the purpose of disposing of her cargo, and it is no answer that this has not been done because circumstances may have caused her to change her intention,‡ but it is not so with a vessel which has entered a commercial port under the sanction of laws and treaties. It is, however, settled that in all cases a neutral vessel may not load any part of a cargo after notification of blockade, and that even when time is given for quitting the port, she must not continue her loading during that time, she may only quit the port with the cargo she has or in ballast.§

Where, however, a vessel has been permitted to enter a port,

* *The Hurtige Hane*, 2 Rob. 226 ; *The Charlotta*, 1 Edw. 256. In the latter case the necessity was admitted, in the former not. The question appears to be merely one of fact. See *The Fortuna*, 5 Rob. 27, *vide supra*, p. 111.

† *The Comet*, Edw. 32.

‡ Halleck's Int. Law.

§ And see Dana, Wheaton's Int. Law, note 235, p. 683, referring to the correspondence between the English and American Governments, and the decisions in the American Courts on this point. See the Notification by the French in the present war, on the occasion of the blockade of the 15th August, 1870.

there is an implied licence that she may leave it with a cargo ;* and when she has been driven in with stress of weather she may leave, but only in the same state as she entered. Mr. Halleck, quoting Duer on Insurance, says :—"Another and a very equitable exception is allowed in favour of a neutral ship that leaves the port in the just expectation of a war between her own country and that of the blockaded port, even when she takes a cargo with her. But to save such a vessel from condemnation, it must appear that there was a well-founded expectation of immediate war, and consequently that the danger of the seizure and condemnation of the property was imminent and pressing."

SECT. 8.—PENALTIES FOR VIOLATION OF NEUTRALITY.

By Municipal Law.—It is clearly agreed by all writers, that the violation of neutrality is not an offence against the municipal law of the neutral state. Mr. Justice Story, in the *Santissima Trinidad*,† says, "There is nothing in our law, or the law of nations, that prohibits our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure, which no nation is bound to prohibit, and which only exposes the person engaged in it to the penalty of confiscation."

So in the case of blockade, it has been held in our Courts, that, "For a neutral country to carry on trade with a blockaded port, is not a municipal offence by the law of

* *Henricus Draik*, 3 Rob. 147, in notis. Halleck's Int. Law, ch. xxiii. s. 34 ; Duer on Ins., vol. i. pp. 682, 683.

† Wheaton's Rep. 340.

nations."* But though it is not illegal by municipal law, yet it is such an offence against the law of nations, that, in the American Courts, it has been decided that the blockade of the port of destination is a dissolution of the contract of affreightment,† and Lord Stowell suggested in *The Jubilee*, that where a blockade is notified to a neutral master, although he has signed the charter-party, he is not bound to proceed.‡

In some cases, however, nations have imposed restrictions on the carrying on of contraband trade by their subjects, and the English legislature has just passed an Act, the 33 & 34 Vict. c. 90, rendering the building or dispatching of ships for belligerent military use, illegal by English municipal law; the 8th section of which is as follows:

Illegal Shipbuilding.—Penalty on Illegal Shipbuilding.

8. If any person within her Majesty's dominions, without the licence of her Majesty, does any of the following acts, that is to say;—

(1.) Builds, or agrees to build, or causes to be built, with intent or knowledge, or having reasonable cause to believe, that the same shall, or will, be employed in the military or naval service of any foreign State at war with any friendly State; or

(2.) Issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe, that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; or

* *The Helen*, Jurist, N. S., Dec. 30, 1865; and see Ex parte Chavasse, Jur. N. S., 20th May, 1865.

† *Scott* v. *Lully*, 2 Johns. Rep. 336.

‡ 6 Rob. 177; see *Madeiros* v. *Hill*, 8 Bing. 231.

(3.) Equips any ship with intent or knowledge, or having reasonable cause to believe, that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; or

(4.) Dispatches, or causes, or allows to be dispatched, any ship, with intent or knowledge, or having reasonable cause to believe, that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State:

Such person shall be deemed to have committed an offence against this Act, and the following consequences shall ensue:

(1.) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2.) The ship in respect of which any such offence is committed, and her equipment, shall be forfeited to her Majesty,

The Act proceeds to give jurisdiction to the Admiralty Courts, and provides for the detention and inspection of suspected ships.

A saving clause is then introduced in favour of a ship being built in pursuance of a contract made before war, provided notice is given to the Secretary of State of the fact, and securities entered into that the vessel shall not be dispatched, delivered, or removed, before the end of the war without licence.

The four offences against which this section is directed, are therefore, the building, putting in commission, equipping, or dispatching, any ship with intent or knowledge, &c. The

ambiguity of this section might leave it in doubt whether it applies to the case of a neutral offering a vessel of war for sale to a belligerent in the way of trade, as in the case of *The Richmond* and *The Rouen*,* or is only intended to apply to the case where a ship has been built, equipped, or dispatched to the express or constructive order of a belligerent, had not the decisions† on the American Act, which the English one closely follows, apparently already settled the point. The difference between the two cases is this:—A neutral who builds, &c., to the order of a belligerent, runs no risk, though the war should be at an end before the vessel is ready for sea, and though the vessel be captured and condemned by the other belligerent as soon as she leaves the territorial waters of the neutral. But where a neutral builds, &c., as it were, on speculation, and hopes to find a market, all the risk falls upon him. The American Government, in the recent question of *The Alabama* claims, admitted ‡ that a neutral is justified by municipal law in building, &c., a vessel for the market. The risk he runs of his vessel being seized and condemned as contraband of war, of his not being able to find a market in consequence of peace being proclaimed, the ports of the belligerent being blockaded, as was the case of the Southern States, &c., being sufficient sanction to the rule of international law, that a neutral may not carry contraband to the enemy. But where a neutral builds to order, he can suffer no penalty. The ship has been ordered, and must be paid for; he will, therefore, receive his money, whatever be her fate. This distinction is not, however, so very important, unless privateering were re-established, for modern ships of war are practically too expensive to be constructed on speculation and the chance of a market. But if privateering were re-established, as it might be in the case

* *Vide* p. 76. † *Vide* p. 118.

‡ And see Mr. Justice Story in *The Santissima Trinidad*, 7 Wheaton, 340, *supra*.

of a war with the United States, then as this is a service for which many merchant vessels, with a little alteration, would be well adapted, it might then become a question whether an Englishman who offered a ship suitable for a privateer for sale, in the way of trade, to either belligerent, would come within the provisions of this Act.

The American law is thus stated by Mr. Dana in note 215 to his edition of Wheaton's International Law :*—

"If any person does any act or attempts to do any act towards the preparation of a vessel with the intent that the vessel shall be employed in hostile operations, he is guilty under the act; the intent, however, must be that she must be employed in hostile operations, and the intent must be a fixed and present intent, and not a wish or desire merely that she may be. Our rules do not interfere with *bonâ fide* commercial dealings in contraband of war. An American merchant may build and fully arm a vessel, and supply her with stores, and offer her for sale in our own market. But if he does any acts as an agent or servant of a belligerent, or in pursuance of an arrangement or understanding with a belligerent that she shall be employed in hostilities when sold, he is guilty. He may, without violating our law, send out such vessel so equipped, under the flag and papers of his own country, with no more force of crew than is suitable for navigation, with no right to resist search or seizure, and to take the chances of capture as contraband merchandise, of blockade, and of market in a belligerent port. The principle is clear enough. Is the intent to prepare an article of contraband merchandise to be sent to the market of the belligerent subject to the chances of capture and of the market? or, on the other hand, is it to fit out a vessel which shall leave our port to cruise immediately or ultimately against the commerce of a friendly nation? The trade in contraband a belligerent may

* See the cases cited there as to what amounts to building, augmenting, &c., within the meaning of the Act of the 20th April, 1818.

cut off by cruising the seas and by blockading his enemy's ports. But to protect himself against vessels sailing out of a neutral port to commit hostilities, it would be necessary for him to hover off the ports of the neutral." (It not being necessary that vessels so fitted out should ever visit the ports of the nation under whose flag she fights, and perhaps, as in the case of the Southern cruisers, that she should have any port to which she could go.) "And to do that effectually he must maintain a kind of blockade of the neutral coast, which, as neutrals will not permit, they ought not to give occasion for." Such is the state of the American law; and notwithstanding the ambiguity of the words of the English Act, in all probability when the question is raised the construction, put upon the latter statute in the English Courts, will follow that given above as the result of the decisions in the American Courts.

It would appear, therefore, that the sale of a vessel of war is a question of contraband only, and therefore the inequality that is said to exist in the restraint of vessels of war, while ammunition and arms are allowed to be freely supplied to a belligerent, disappears. As a matter of mere contraband merchandise, the rules of municipal law as well as that of nations apply equally. But there is this great distinction between vessels and arms. Both, it is true, require the hand of man to render them effective. But a vessel not only is an instrument of war equally with a rifle or a bullet, but it also is a home for the human power that works it. Arms not only require to be placed in the hands of an enemy, but they must be carried to a particular spot of the earth's surface. But a vessel is, as it were, a floating portion of the earth's surface herself, and therefore directly her organisation is complete she becomes self-sustaining, and requires no other aid beyond her own to carry her all over the world. The neutral, therefore, who equips a vessel for belligerent service, not only finds an engine of war, but also fighting ground

for the belligerent; and it is in this that the distinction lies.*

Capture of Neutral Vessels.—We have seen that the infringement of certain of the rules of international law by the private vessels of neutral States subjects them to capture and condemnation in the competent Courts of the captors; and that belligerent nations claim to exercise this right of capture and jurisdiction over neutral vessels upon the high seas, a locality where no particular nation has exclusive jurisdiction, and where, consequently, all nations may equally exercise their international rights. But though the neutral vessel is thus amenable to the belligerent nation for violation of her neutrality on the high seas, she cannot be in a worse condition than a vessel confessedly the property of an enemy; and therefore she is entitled to all the immunity from capture in neutral waters and the other privileges which are by the law of nations granted to actual hostile property, the principal rules on which subject may here be briefly stated.

Jurisdiction over Vessels at Sea.—Both public and private vessels of every independent nation on the high seas, and without the territorial limits of any other State, are subject to the municipal jurisdiction of the State to which they belong.† This jurisdiction is exclusive only so far as respects offences against the municipal laws of the State to which the vessel belongs. It excludes the exercise of the jurisdiction of every other State under its municipal laws, but it does not exclude the jurisdiction of other nations as to crimes under international law, such as piracy and other offences, which all nations have an equal right to judge and to punish.

Public Ships.—A distinction is to be made between the public and private vessels of a nation. A public vessel belonging to an independent sovereign is exempt from every species

* See letter of Historicus on the Foreign Enlistment Act of 1819.

† Wheaton's Int. Law, s. 440.

of visitation and search, even within the territorial jurisdiction of another state. *A fortiori,* must it be exempt from the exercise of belligerent rights on the ocean, which belong exclusively to no one nation.* And where vessels have been illegally captured, but afterwards fitted out as public ships, this immunity attaches.† And in another American decision, *Briggs* v. *The Lightships,*‡ it was held, that by a ship becoming the public property of the United States, and used in the discharge of public duties, a private citizen lost his lien. It now seems to be established, both in England and America, that no vessel or other property used by the Government for public purposes, whether these purposes be military, fiscal, or of police, are subject to judicial proceedings without the consent of the Government, whether to enforce a lien or an open claim, or whatever be the nature of the demand.

Neutral Waters.—The rights of war can be exercised only within the territory of the belligerent powers, upon the high seas, or in a territory belonging to no one. Hence it follows that hostile captures cannot be made within the territorial jurisdiction of a neutral state.§

The maritime territory of every State extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the seas enclosed by headlands belonging to the same State. The general usage of nations superadds to this extent of territorial jurisdiction, a distance of a marine league, or as far as a cannon shot will reach from the shore, along all the coasts of the State. Mr. Dana, in a note, points out the different authorities on the extent of territorial rights over the sea.‖ Grotius, lib. ii. cap. 3, ss. 13, 14, limits it to the effective range of regular weapons of war. Hautefeuille adheres to the rule of the cannon shot, but

* Dana, note 63. † *The Exchange,* 7 Cranch, 116. ‡ Allen, Rep. xi.

§ Bynkershoek, Quæst. Jur. Pub. lib. i. c. 8 ; Marten des Prises et Reprises, ch. 2, s. 18 ; Wheaton's Int. Law, by Dana, 8th ed., pt. iv. s. 428.

‖ Wheaton's Int. Law, p. iv. s. 177, note 105.

contends that in small bays and gulfs, the line from which the cannon shot should be measured is a line drawn from headland to headland. This does not apply to the case of bays, really parts of the public ocean, and the majority of the authorities cited seem in favour of the extent being that to which projectiles of war can be effectively thrown from the shore. As Bynkershoek puts it, the authority of the land ceases where its weapons cease to be effective.*

Within these limits the nation's rights of property and territorial jurisdiction are absolute, and exclude those of every other nation.† Two results spring from this concession on the part of other nations. The one is that the right of fishing, and the right to seize vessels of other nations for breaches of municipal law, are conceded to the State who has exclusive jurisdiction over the water. But it may be said that the principle is settled that municipal seizures of foreign vessels for any purpose (such as breaches of revenue and other laws), will not be permitted beyond territorial waters. It is also settled that in the absence of treaties the limits of these waters is the marine league or cannon-shot. If foreign vessels have been boarded and seized on the high seas, and have been adjudged guilty, and their Governments have not objected, it is probable either because they were not appealed to, or have acquiesced in the particular instance from motives of comity.‡ It appears that, as in the case of vessels seized in neutral waters, the remedy is by appeal to the Government of the vessel; and that the condemnation by the municipal Court is *primâ facie* evidence that the capture was regular.§

The second result that springs from the recognition of territorial waters is, not only are all captures made by the belligerent cruisers, within the limits of this jurisdiction, absolutely illegal

* Suæ potestas finitur ubi finitur armorum vis.

† Ibid. s. 177. ‡ *Vide post.*

§ *Vide post;* Dana, Wheaton's Int. Law, note 108; *Hudson* v. *Guertier*, 4 Cranch, 293.

and void, but captures made by armed vessels stationed within this jurisdiction, although the capture is made beyond it, are also invalid. As Lord Stowell says,* in *The Anna*, which was the seizure of a merchant vessel, "Captors must understand that they are not to station themselves in the mouth of a neutral river for the purpose of exercising the rights of war *from* that river, much less in the very river itself. The captors appear, by their own description, to have been standing off and on, obtaining information at the Balize, overhauling vessels in their course down the river, and making the river as much subservient to the purposes of war, as if it had been a river of their own country. This is an inconvenience which the States of America are called upon to resist, and which the Court is bound on every principle to discourage and avert." Restitution was decreed, with costs and damages. And in *The Twee Gebroeders*, Lord Stowell† lays it down: "No act of hostility is to take its commencement on neutral ground. You are not to avail yourself of a station on neutral ground, making, as it were, a vantage ground of the neutral country, a country which is to carry itself with perfect equality between both belligerents, giving neither the one nor the other any advantage. Every Government is perfectly justified in interposing to discourage the commencement of such a practice for the inconvenience to which the neutral territory will be exposed is obvious. If the respect due to it is violated by one party, it will soon provoke a similar treatment from the other also; till, instead of neutral ground, it will soon become the theatre of war." And in the case of *The Chesapeake*, which was an arrest in British waters of an American vessel that had been piratically seized by the Confederates, it was held that this was a breach of neutral privileges, and the vessel and prisoners were restored to British authority, and an apology and disclaimer made by the United

* 5 Rob. 373. † 3 Rob. 162.

States. The rule, as laid down by Lord Stowell,* in *The Vrow Anna Catherina*, appears to be the settled law, and as such is recognised by Wheaton.† "The sanction of a claim of territory is undoubtedly very high; when the fact is established it overrules every other consideration. The capture is done away. The property must be restored, notwithstanding that it may actually belong to an enemy. And if the captor should appear to have erred wilfully, and not merely through ignorance, he would be subject to further punishment."‡

And now, by the generally received custom of nations, not only is an armed vessel or merchantman protected in neutral waters, but a vessel of the other side is not allowed to start in pursuit until twenty-four hours have elapsed.§ It would appear, from a note of Mr. Dana's,‖ that where the waters of a neutral have been violated, the nation to which the property belongs has a right to restitution from the neutral nation, and such restitution will be granted provided the ship captured has not attempted to defend herself by force, but has relied upon the neutral protection. In the case of *The General Armstrong*, an American privateer, destroyed in neutral harbour at Fayal, the question was referred to Louis Napoleon, then President of the French Republic, who thus directed the law, which the American Government did not dispute, but questioned the fact.**

It also appears that the capture of a vessel by a ship that has been fitted out in a neutral state is invalid by the law of nations, and restitution must be made. In the case of *The Santissima Trinidad*, decided in the American courts, the judgment being given by Story,†† it was laid down that where a vessel has been illegally augmented in the ports of the United States, being neutral, that as to captures made during the

* 5 Rob. 15. † P. iv. s. 429.

‡ Notably by payment of costs and damages. *Vide The Anna, supra.*

§ Dana, Wheaton's Int. Law, 8th ed., note 208. ‖ p. 526.

** Ex doc. 32 Cong. Senate, No. 24.

†† Wheaton, Rep. vii. 283.

cruise, the doctrine of this Court has long established that such illegal augmentation is a violation of the law of nations, as well as of municipal laws; and, as a violation of neutrality by analogy to other cases, it affects the captures subsequently made with the character of torts, and justifies and requires a restitution to the parties who have been injured by such misconduct. It does not lie in the mouth of wrong-doers to set up a title derived from a violation of neutrality.

Restitution only on application of Neutral State.—Restitution will not, however, be made except upon the application of the neutral Government whose territory has been thus violated.* The rule is founded upon the principle that the neutral state alone has been injured by the capture, and that the hostile claimant has no right to appear for the purpose of suggesting the invalidity of the capture.† The reason given for this is, that where a neutral vessel which has violated neutrality so as to make herself liable to condemnation as a prize is captured as such at sea by a cruiser, and sent in for adjudication, the Court will condemn her or not, on the merits of the case. It is not, therefore, a valid defence that the place of her arrest was the waters of some other neutral power. The breach of sovereign territorial right is a matter solely between the State making the capture, and the State whose territory is entered upon,‡ and, therefore, a suggestion of neutral territory cannot be set up by an individual claimant.§

The general rule is that where a capture has been made, and on the merits of the case the vessel would be liable to condemnation, but that such condemnation would be illegal by the law of nations, in consequence of some violation of these laws by the captors, the claimant of the vessel is not entitled to restitution,

* Wheaton, Rep. 430. † Ibid., s. 433.

‡ Wheaton, by Dana, note 209.

§ *The Twee Gebroeders*, 3 Rob. 162, note; *The Anne*, 3 Wheaton's Rep. 435; *The Lilla*, 2 Sprague's Decisions, 177.

but the vessel must be claimed in the court of condemnation by the Government of the party aggrieved, for the jurisdiction of the national courts of the captor to determine the validity of captures made in war under the authority of his Government is exclusive of the jurisdiction of every other country.* The Americans, however, claim to make two exceptions to this :— first, where the capture is made within the territorial limits of their State ; second, where the capture is made by armed vessels fitted out within their territory. In either of these cases their judicial tribunals claim the jurisdiction to determine the validity of the captures thus made, and to vindicate their neutrality by restoring the property to its own subjects, or of other States in amity with it, to the original owners.† And it has been long settled‡ that this duty does not belong to the executive Governments, but to the Federal tribunals acting as courts of Admiralty and Maritime jurisdiction, and only applies when the property has been voluntarily brought within the territory of the United States. And it is doubtful, then, whether this jurisdiction will be exercised where the property has once been carried *infra præsidia* of the captor's country, and there regularly condemned in a competent court of prize ; and more especially where it has come into the hands of a *bonâ fide* purchaser without notice of the unlawfulness of the capture. For the jurisdiction of the court of the capturing nation is conclusive upon the question of property in the captured thing. Its sentence forecloses all controversy respecting the validity of the capture as between claimant and captors, and those claiming under them, and terminates all ordinary judicial enquiry upon the subject. But when the responsibility of the captors ceases, that of the State begins, and it becomes a question between Government and Government, directly the acts of the captors are confirmed by the definitive sentence of the tribunals appointed‡ to deter-

* Wheaton's Int. Law, s. 388. † Wheaton's Int. Law, s. 432.
‡ Wheaton's Int. Law, s. 390.

mine the validity of captures in war. The American Government draws another distinction, permitting property that has been captured by vessels illegally fitted out in the American ports to be claimed personally by the person injured; but where the property has been seized in their territorial waters, the claim must be suggested by the Government of the injured party according to the general rule.*

It does not appear that other modern nations claim this right to interfere with the exclusive jurisdiction of the Prize tribunals of the captors, but prefer to deal with the Government of those tribunals.† Still, as Mr. Wheaton says, there is no reason why the neutral State should not attach this or any other condition to the privilege granted to a captor of bringing his captures into its ports. And now, by an Act passed by the Legislature of Great Britain during the present session,‡ 33 & 34 Vict. c. 90, s. 14, the British Government have power to restore illegal prizes brought into their ports. The words of the section are:—

> "If during the continuance of any war in which her Majesty may be neutral, any ship, goods, or merchandize, captured as prize of war within the territorial jurisdiction of her Majesty,§ in violation of the neutrality of this realm, or captured by any ship which may have been built, equipped, commissioned, or dispatched, or the force of which may have been augmented, contrary to the provisions of this Act, are brought within the limits of her Majesty's dominions by the captor or any agent of

* *Vide supra.*

† See *The Santissima Trinidad*, 7 Wheaton's Rep. 283; Dana's note 186 on Prize tribunals, and note 215 on Neutrality or Foreign Enlistment Acts.

‡ 1870.

§ Including not only the ports but the adjacent territorial waters.

> the captor, or by any person having come into possession thereof, with knowledge that the same was prize of war so captured as aforesaid, it shall be lawful for the original owner of such prize, or his agent, or for any person authorized in that behalf by the Government of the foreign State to which such owner belongs, to make application to the Court of Admiralty for seizure and detention of such prize, and the Court shall on due proof of the facts order such prize to be restored."

The section concludes with a provision for the interim custody, &c., of the property.

By this section the British Courts are empowered to restore illegal captures in the same way that the American do. The section, however, appears to leave in doubt what would be the status of such ship if it had been carried into the ports of the captor, and more particularly if it had been regularly condemned in his Courts.

Condemnation.—By the recognised rules of international law the right to all captures vests primarily in the Sovereign, and no individual can have any interest in a prize, whether made by a public or private armed vessel, but what he receives under the grant of the State. But the general practice under the laws and ordinances of the belligerent Government is to distribute the proceeds of the captured property when duly pressed upon and condemned as prize (whether captured by public or private commissioned vessels) among the captors as a reward for bravery and a stimulus to exertion.* In England at the commencement of each war a Prize Act is passed by Parliament, and at the same time a royal proclamation declares the distribution of prize money.

* Kent's International Law, ch. vi.

But though the capture is by law made for, and on behalf of the Sovereign commissioning the cruisers that effect the capture, still by the modern rule of international law the property does not pass to the captors until a regular sentence of condemnation has been pronounced by some court of competent jurisdiction belonging to the Sovereign of the captor. Until the capture becomes invested with the character of prize by a sentence of condemnation, the right of property is in abeyance, or in a state of legal sequestration.

The capture being made for the Sovereign of the captors, he is responsible to other States for the legality or otherwise of the capture, and therefore it is his duty to enquire into the circumstances of the capture, which is done in those Courts on which he has conferred jurisdiction to try the question. But, as Mr. Dana says,* a trial by a Prize tribunal is not a right enemies can claim, nor is it a duty owed them. By this investigation he informs himself whether he is justified in confirming the capture or whether he is not bound to restore the capture, compensating the parties injured, according to the requirements of the case. It is after this investigation that the Sovereign of the captors takes the onus of the capture upon himself, and the property at once passes, and any further question as to the legality of the capture, and the rights of the parties becomes an international question between the respective Governments.†

The necessity for the capture to be ratified by the Sovereign on whose behalf it is made, and that no capture is valid till ratified, imposes upon the captors the duty of sending the prize in for adjudication. In the case where the captors are the weaker on the seas, this imposes some hardship on them, as they run the risk of losing their prizes on the voyage in for adjudication, especially as the rule of international law is

* Wheaton, note 186.

† See Dana's Wheaton, note 186, s. v.

that Prize Courts can only sit in the country of the captor or of his ally,* and only in the latter on the ground that the allied State and that of the captors are considered as forming one community.† But it would appear that no Prize Court of an ally can condemn.‡

In the old wars between France and Great Britain, the former country attempted to establish a Prize Court in neutral countries, but Lord Stowell, in a series of decisions, refused to allow the validity of such Courts, and denied that the property passed by their condemnation. In the case of *The Kierlighett*, he says:—§

"Among the many novelties that the French have introduced into the world, the condemnation of prize vessels in neutral ports, under the authority of Consular Courts sitting there, is not the least extraordinary. These condemnations sustained by the tribunals of France may be good and valid against French subjects on a second capture by French cruisers, or in any other way in which they may come before them in transactions among their own subjects, as considered by the law of their own country; but they are not binding on other countries. This Court, as representing this country in such matters, has already signified its opinion upon them."

And Mr. Kent says:—‖

"Neutral ports are not intended to be auxiliary to the operations of the power at war, and the law of nations has clearly ordained that a Prize Court of a belligerent captor cannot exercise jurisdiction in a neutral country. This prohibition not merely rests on the unfitness and danger of making neutral

* Kent's Int. Law, ch. vi.

† *The Christopher*, 2 Rob. 210; see *Oddy* v. *Bovill*, 2 East, 473.

‡ Kent's Int. Law, ch. vi., quoting Abbott on Shipping, p. 21 and cases cited. There, however, seems to be no authority for this statement.

§ 3 Rob. 96.

‖ Int. Law, ch. vi., and see cases referred to.

ports the theatre of hostile proceedings, but stands on the ground of the usage of nations."

But the condemnation of a capture in the recognised Prize Courts is good, although the capture is lying in a neutral port; for though it is the duty of the captor to send his prize to a port of his own country—that the prize tribunal may have it within its custody, to ensure a fairer investigation of evidence, to diminish the risks of concealment or destruction by the captors of evidence or property, and to ensure a fair sale for full value in case of condemnation, or a speedy and satisfactory restitution—yet there is no question that a Prize Court may decide the question of prize or no prize, though the vessel be actually lying in a neutral port.*

In Delicto.—A neutral vessel, having offended against the rules of international law, is protected from all penalties, unless she is actually taken *in delicto.*

It is necessary, therefore, to enquire where the distinction begins, and where it ends.

In the case both of the transport of contraband goods and of the violation of a blockade, as we have seen, the offence is complete at the commencement of the voyage; and, therefore, the moment that the vessel quits her port on the illegal voyage she is liable to capture. In the case of contraband, the penalty does not in general attach to the return voyage; and, therefore, the proceeds of the sale of the contraband articles cannot be attached.† It would appear, however, that this lenity is only shown where the return voyage is of a distinct nature In *The Nancy* ‡ Lord Stowell says :—

"In European voyages of no great extent, where the master goes out on one adventure, and receives at his delivering ports new instructions and further orders, in consequence of advice

* Dana, note 168, s. vii. † *The Mina*, 3 Rob. 581.

‡ 3 Rob. 127.

obtained of the state of the markets, &c., the rule has prevailed that the return voyage is not to be deemed connected with the outward; but I do not think that in distant voyages to the East the same rule is fit to be applied. In such a transaction the different ports are not to be considered as two voyages—but as one transaction, formed upon one original plan, conducted by the same persons, and under one set of instructions. I shall, therefore, hold the consequences to attach to the whole transaction." *

Blockade.—In the case of blockade, the offence does not continue to the return voyage, where the vessel has returned without effecting her purpose. On the outward voyage the vessel is liable to be taken for the attempt; but on her return she has given up the attempt, and the delictum is at an end.† Where, however, the vessel has escaped through a blockade, the offence lasts with the voyage,‡ and is not cancelled by a mere interruption of the voyage, such as the stopping of the ship at an intermediate port through accident or design. When she resumes her voyage, she again becomes subject to the penalty.§ Where a vessel had been driven into a port of this country by stress of weather, she was seized, and condemned for a breach of blockade, not having arrived at the end of her voyage.‖

Subsequent Voyage.—A vessel is not free from capture, even in a subsequent voyage, if, as Lord Stowell says,** in *The Christianaberg*, it affords the first opportunity of enforcing the law. In this case, a neutral vessel had been permitted to leave a blockaded port with a cargo under the condition that she sailed to a neutral port only, which condition was agreed to. But instead of doing so, she proceeded to an enemy's port, to which

* See Halleck, ch. xxiv. s. 8, and cases cited on this point,
† Halleck, ch. xxiii. s 37. ‡ *The Van Welvaart*, 2 Rob. 128.
§ *The Juffrow Maria Schroeder*, 3 Rob. 147.
‖ *The General Hamilton*, 6 Rob. 61. ** 6 Rob. 376.

she was not entitled to go. Lord Stowell said, "Until the vessel actually entered the interdicted port it could not appear whether she were *in delicto* or not, and it was not till the vessel came out on a subsequent voyage that there was any opportunity of vindicating the law and inflicting the penalty." *

Continuous Voyages.—A vessel need not, however, be actually engaged in an illegal voyage to be *in delicto*, if the voyage in which she is taken is in continuity with an illegal voyage. The general rule is, that the transport of goods, contraband or otherwise, between neutral ports is no breach of neutrality. But belligerents will not permit the fraudulent use of an intermediate port to cover an ultimate hostile destination. In *The Thomyris*, Lord Stowell lays it down :—†

"In all cases of this description it is a clear and settled principle that the mere transhipment of a cargo at an intermediate port will not break the continuity of the voyage, which can only be effected by a *previous actual importation into the common stock of the country where the transhipment takes place.*"

Nor was the fact that a sale took place held conclusive evidence of the required intermediate transhipment. Lord Stowell says :—‡

"The fact that the goods after their arrival in the Tagus were converted by sale has been much relied on as satisfactory evidence of an actual and *bonâ fide* importation into the country; and, generally speaking, it is so, because it is to be understood in most cases that goods are actually imported before they can be sold; but it has never been decided that where goods are brought to an intermediate port, not *animo importandi*, but sold whilst water-borne, and then transhipped, such sale with transhipment makes a new exportation from the port in which it is transacted. In order to constitute an ex-

* See *The Rosalie and Betty*, 2 Rob. 343; *The Mentor*, Edw. 207.
† Edw. 17. ‡ Ibid.

portation, there must have been a previous importation in the case of commodities not native. Where a cargo is sold to be immediately transhipped and exported, that can never be considered as any importation at all; it is all one act, of which the sale and transhipment are only stages. They lengthen the chain, but do not alter its direction."

The reason of this decision, however hard it may sometimes press, is that it closes the door to fraud. As Mr. Dana says:—* "The right of the belligerent is to know the facts. The policy of the neutral is to conceal them, and would, therefore, be careful to go through all the forms necessary to assimilate a fictitious to a real destination." So Lord Stowell says in *The William*.† Between the actual importation, by which a voyage is really ended, and the colourable importation which is to give it the appearance of being ended, there must be necessarily great resemblance. The acts to be done must be almost entirely the same, but there is this difference between them. The landing of the cargo, the entry at the custom-house, and the payment of such dues as the law of the place requires, *are necessary ingredients* in a genuine importation. The true purpose of the owner cannot be effected without them. But in a fictitious importation they are *mere voluntary ceremonies*, which have no natural connection whatever with the purpose of sending on the cargo to another market. Where, however, goods had been landed and warehoused for a considerable time; Lord Stowell thought it raised a presumption in favour of the neutral, and that the onus was on the other party to show how this was merely insidious and colourable.‡

Transhipment to Barges.—The continuity of the voyage is

* See *The Maria*, 5 Rob. 365, and cases cited there, note 231.

† 5 Rob. 385.

‡ *The Polly*, 2 Rob. 361. See, as to the question of colourable transhipment, *The Matchless*, 1 Hagg, 97; *Eliza Ann*, 1 Hagg, 254; and in the American Courts, *Mary*, 9 Cranch, 126.

not, therefore, broken by mere transhipment to another vessel; and where a cargo is to be taken to or from a neutral port by barges that pass through the blockade, the voyage being continued from the neutral port in a neutral vessel, the neutral vessel is *in delicto*, and would be liable to condemnation as taken on a continued voyage.*

Canal or Land Communication.—Where, however, the voyage is continued from the neutral port by canal or land communication over which the belligerent by his rights of blockade has no jurisdiction, the voyage to the neutral port is not delictum, and there is no breach of the blockade.†

In the case of *The Jonge Pieter*, Lord Stowell, however, laid it down that though there would be no breach of blockade, still, if the goods were sent by an Englishman they would be liable to be condemned as taken in trade with the enemy, for without licence no communication, direct or indirect, can be carried on with the enemy.

Ignorance of the Master.—It appears, however, that if it be shown in the enquiry into the continuity of the voyage, that the carrier did not know of any destination of the cargo beyond that of the neutral port, and that his ignorance was excusable, he would not lose his freight and expenses.‡

Alteration of Circumstances.—Where, however, before capture, by change of circumstances the voyage of the neutral vessel, that was illegal, is rendered innocent, the delictum is at an end, and she is free from capture.

Thus, in the case of *The Imina*,§ a voyage was commenced with an illegal destination, but was *bonâ fide* altered to a neutral port before capture, the cargo was restored, but the captors' ex-

* *The Maria*, 6 Rob. 201; *The Charlotte Sophia*, ibid. in notis; *The Lisette*, 6 Rob. 387.

† *The Stert*, 4 Rob. 65; *Jonge Pieter*, 4 Rob. 79; *Ocean*, 3 Rob. 297.

‡ Dana, note 231; *Ebenezer*, 6 Rob. 256.

§ 5 Rob. 167.

penses were decreed owing to the necessity for adjudication, from the circumstances of the apparent original destination.

So in the case of *The Trende Sostre*,* where a vessel sailed to a hostile port, which came into the possession of the English before capture, though after the commencement of the voyage, it was held that the delictum was done away with.

So in the case of *The Lisette*,† where the blockade was raised before capture, Lord Stowell said,—"I have had no case pointed out to me in which the Court has pronounced an unfavourable judgment on a ship seized for the breach of a *bygone* blockade. When the blockade is raised, a veil is thrown over everything that has been done, and the vessel is no longer taken *in delicto*. The delictum may have been completed at one period, but it is by subsequent events entirely done away."

Penalty for Violation of the Duties of Neutrality.—Contraband.—"Formerly," as Sir C. Robinson says, in a note to *The Mercurius*,‡ "the carrying of contraband articles involved a forfeiture of the ship. In modern practice, however, except where the contraband articles belong to the owner of the vessel, or where the case is attended with particular circumstances of aggravation, the penalty has been mitigated to a forfeiture of freight and expenses." § Mr. Dana, however, casts some doubt upon the justice of allowing the owner of a vessel to carry contraband goods of another, without the penalty of his ship being condemned, which he suffers if he carry his own. And that author considers the rule arose when the knowledge of the carrier was thought to be important, as deciding the state of his vessel, and that the rule once established survived the reason that established it.

Lord Stowell, however, adhered strictly to this rule; and in the *Jonge Tobias*, ‖ where certain contraband articles were un-

* 6 Rob. 390, in notis.
† 3 Rob. 387.
‡ 1 Rob. 288.
§ See Bynkershoek, Quæst. Jur. Pub. lib. i. c. 1.
‖ 1 Rob. 329.

claimed, but it appeared by the ship's papers that they belonged to a part owner of the ship, his share in the ship was condemned, and Lord Stowell required the attestations of the other part owners that they had no knowledge of the contraband goods before he restored their shares. And Lord Stowell laid it down,—

> "Where the owner of the cargo has any interest in the ship, the whole of his property will be involved in the same sentence of condemnation; for when a man is concerned in an illegal transaction, the *whole* of his property embarked in that transaction is liable to confiscation."

Mixed Cargo.—A similar rule applies where a cargo is partly contraband and partly not. In the *Staat Embden*, where the cargo was of a mixed nature, Lord Stowell* condemned the whole, being the property of one individual, on the ground that "although contraband articles may not affect other innocent articles the property of a different owner, yet they contaminate every part of the same cargo, and make it subject to confiscation; to escape from the contagion of contraband, innocent articles must be the property of different owners.

False Destination.—In all cases perfect good faith is required of neutral owners, to exempt their vessels from condemnation. As an example of *mala fides*, Lord Stowell, in *The Franklin*, laid it down after deliberation, "That it is to be considered as the settled rule of law, received by this Court, that the carriage of contraband articles with a *false destination*, will work a condemnation of the ship as well as the cargo." At the same time, that Judge pointed out,† that though "in the earlier case of *The Sarah Christina*, the Court, from a favourable regard to some particular circumstances, practised an

* 1 Rob. 26. † 1 Rob. 328.

negligence in restoring the ship, but without freight or expenses of demurrage, at the same time to be hardly reconcileable with just principles." *

Similarly where the neutral master was bound not to carry the particular cargo by the obligations of treaty entered into between his Government and that of the captors. Lord Stowell held it to be a case of singular misconduct, and condemned the ship.† So where the nature of the cargo was concealed by the master, false bills of lading were used, &c., the ship was condemned.‡

Ignorance of Master no excuse.—In the case of *The Oster Riaen* the Court held, that the master could not be permitted to aver his ignorance: that he was bound in the time of war to know the contents of his cargo: that if a different rule could be sustained it might be applied to excuse the carrying of all contraband.

Ship condemned, Cargo how affected.—We have seen that where a neutral vessel illegally carries belligerent persons or papers she is liable to condemnation; but in the cases decided by Lord Stowell,§ the cargo only was condemned where the supercargo was implicated, and where the master alone was at fault, and it did not appear that he was agent for the cargo, it was restored.

Blockade.—In the case of the violation of a blockade the general rule is, that both ship and cargo are confiscable, and the presumption of law is that, "in almost all cases of breach of blockade the attempt is made for the benefit and with the privity of the owners of the cargo, and that if they were at liberty to allege their innocence of the act of the master, it would be easy to manufacture evidence for the purpose, which the captors would have no means of disproving; and that in

* See *The Ranger*, 6 Rob. 126; *The Edward*, 4 Rob. 69.
† *The Neuhahlit*, 3 Rob. 296. ‡ *The Richmond*, 5 Rob. 325.
§ Vide *supra The Atlanta*, 6 Rob. 440, and cases in notis.

order to make a blockade effectual it is essential to hold the cargo responsible to the blockading power for the act of the master to whom the control over it has been entrusted, leaving the owners to seek their remedy against the master or owners of the ship, if in reality the penalty was incurred without any privity on their part." *

Lord Stowell, it is true, relaxed the rigour of this rule where the owners of the cargo could not have been aware of the intended violation of the blockade, as where a vessel sailed before the blockade was proclaimed, and the master persisted in his course after being warned.† So where a vessel was in a port at the time it was blockaded and the owner of the cargo had no opportunity to countermand his shipping, in this case Lord Stowell said, it would be hard to make the owner responsible for the acts of his agent at the blockaded port, who continued the loading and sent the ship out, on account of the opposite interests created between them by the fact of the blockade.

The introduction of marine telegraphs in modern times, has, however, so diminished the time necessary for obtaining information and for receiving orders, that it seems doubtful whether the more rigorous rule will not henceforth prevail, leaving the owner of the cargo to his remedy against the owner of the ship, if the latter should be at fault.

* *Baltazzi* v. *Ryder*, 12 Moo. Pr. Ca. 168. See the cases cited in the arguments and judgment.

† *The Mercurius*, 1 Rob. p. 80; *The Neptunus*, 3 Rob. 73; *The Adelaide*, 3 Rob. 281.

INDEX.

THE END.

BRADBURY, EVANS, AND CO., PRINTERS, WHITEFRIARS.

Taylor's Law of Evidence. Fifth Edition.

A Treatise on the Law of Evidence, as administered in England and Ireland, with Illustrations from the American and other Foreign Laws. By JOHN PITT TAYLOR, Esq., Judge of the County Courts for Lambeth, Greenwich and Woolwich. In 2 vols. Royal 8vo. Price 3*l.* 10*s.* cloth. 1868.

Maclachlan's Law of Merchant Shipping.

A Treatise on the Law of Merchant Shipping; with Supplement. By David MACLACHLAN, M.A., of the Middle Temple, Barrister-at-Law. In 1 vol. Royal 8vo. Price 1*l.* 16*s.* cloth. 1862.

"That case (*Cammell* v. *Sewell*) is well commented on in a work on the Law of Shipping by Mr. Maclachlan, which, so far as I have seen, appears to me an acquisition to legal literature."—Per Williams, J., in *Maitland and others* v. *Graham and others*, *coram* C. B. 14 Nov. 1860.

"It is not so laid down in a book I was looking into last night, the work upon Shipping by Mr. Maclachlan, which is an excellent, able and well-written work."—Per Cockburn, L C.J., in *Castrique* v. *Imrie*, *coram* Exch. Ch. 30 Nov. 1860.

Davidson's Precedents in Conveyancing.

Precedents and Forms in Conveyancing, with an Introduction and Practical Notes. By CHARLES DAVIDSON, THOMAS COOKE WRIGHT, J. WALEY, Esqrs., of Lincoln's Inn, and J. WHITEHEAD, Esq., of the Middle Temple, Barristers-at-Law. In 5 vols. Royal 8vo. Price 10*l.* 18*s.* cloth. 1860-69.

Christie's Concise Precedents of Wills. Second Edition.

Concise Precedents with an Introductory Essay on the Law of Wills, adapted as a Manual for the ready use of Solicitors. By JAMES TRAILL CHRISTIE, Esq., of the Middle Temple, Barrister-at-Law. 12mo. Price 15*s.* cloth. 1857.

Yool's Essay on Waste, Nuisance and Trespass.

An Essay on Waste, Nuisance and Trespass, chiefly with reference to *Remedies in Equity* treating of the *Law of Timber, Mines, Lights, Water, Support, the Construction of Public Works, &c.* By GEO. V. YOOL, M.A., of Lincoln's Inn, Barrister-at-Law, late Fellow of Trinity College, Cambridge. 8vo. Price 10*s.* 6*d.* cloth. 1863.

Smith's Mercantile Law. Eighth Edition.

A Compendium of Mercantile Law. By JOHN WILLIAM SMITH, Esq., of the Inner Temple, Barrister-at-Law. Eighth Edition, by G. M. DOWDESWELL, Esq., of the Inner Temple, Barrister-at-Law. Royal 8vo. (*In the Press.*)

Smith's (John Wm.) Law of Contracts. Fifth Edition.

By J. G. MALCOLM. In 1 vol. Demy 8vo. Price 16*s.* cloth. 1868.

Smith's Action at Law. Tenth Edition. By Prentice.

An Elementary View of the Proceedings in an Action at Law. By JOHN WILLIAM SMITH, Esq., late of the Inner Temple, Barrister-at-Law; Author of "Leading Cases," "A Compendium of Mercantile Law," &c. The Tenth Edition, adapted to the Present Practice. By SAMUEL PRENTICE, Esq., Barrister-at-Law. 12mo. Price 12*s.* 1868.

Westlake's Conflict of Laws.

A Treatise on Private International Law, or the Conflict of Laws, with Principal Reference to its Practice in the English and other Cognate Systems of Jurisprudence. By JOHN WESTLAKE, of Lincoln's Inn, Esq., Barrister-at-Law, and Fellow of Trinity College, Cambridge. In 1 vol. 8vo. Price 12*s.* cloth. 1858.

"A work that will be a permanent addition to legal literature. It is not a mere compilation, but an *original treatise, which the student will read with profit, and the practitioner consult with advantage.*"—*Law Times, May 28, 1859.*

Baker's Law of Burials. Third Edition.

The Laws relating to Burials; with Notes, Forms and Practical Instructions. By THOMAS BAKER, Esq., of the Inner Temple, Barrister-at-Law (of the Burial Acts Office). Third Edition, including the Statutes of the Present Session, and the Scotch and Irish Acts. 12mo. Price 7*s*. 6*d*. cloth. 1863.

Tudor's Leading Cases on Mercantile and Maritime Law. Second Edition.

A Selection of Leading Cases on Mercantile and Maritime Law, with Notes. Second Edition. By OWEN DAVIES TUDOR, Esq., Barrister-at-Law. In 1 vol. Royal 8vo. Price 1*l*. 18*s*. cloth. 1868.

Woodfall's Law of Landlord and Tenant.

A Practical Treatise on the Law of Landlord and Tenant, by WOODFALL. The Ninth Edition, greatly altered and enlarged; with a full Collection of Precedents and Forms of Procedure. By W. R. COLE, Esq., of the Middle Temple, Barrister-at-Law. 1 thick vol. Royal 8vo. 1*l*. 18*s*. cloth. 1867

Hawkins on Wills.

A Concise Treatise on the Construction of Wills. By F. VAUGHAN HAWKINS, M.A., of Lincoln's Inn, Barrister-at-Law, and Fellow of Christ's College, Cambridge. 8vo. Price 10*s*. 6*d*. cloth. 1863.

Warren's Law Studies. Third Edition.

A Popular and Practical Introduction to Law Studies, and to every Department of the Legal Profession. By SAMUEL WARREN, of the Inner Temple, Esq., D.C.L. Oxon, F.R.S., one of Her Majesty's Counsel, Recorder of Hull, and Master in Lunacy. Third Edition, entirely re-written and greatly enlarged. In 2 vols. 8vo. Price 2*l*. 12*s*. 6*d*. cloth. 1863.

Bateman's Law of Auctions. Fourth Edition.

The Auctioneer's Guide, containing a Practical Treatise on the Law of Auctions; with a complete Series of Conditions of Sale, Rules for Valuing Property, the Law of Distress, and numerous Forms, Tables and Precedents. By J. BATEMAN, Esq., LL.D, of Lincoln's Inn, Barrister-at-Law, Assistant Solicitor of Excise, &c. Fourth Edition, adapted to the recent Alterations in the Law. By ROLLA ROUSE, of the Middle Temple, Barrister-at-Law. 12mo. Price 10*s*. 6*d*. cloth. 1863.

Petheram on Interrogatories.

The Law and Practice relating to Discovery by Interrogatories under the Common Law Procedure Act, 1854; together with an Appendix of Precedents and full Index. By WM. COMER PETHERAM, Esq., of the Middle Temple. Crown 8vo. Price 3*s*. 6*d*. cloth. 1864.

Craig's Rights as to Trees and Woods.

Legal and Equitable Rights and Liabilities as to Trees and Woods. By RICHARD DAVIS CRAIG, Esq., one of Her Majesty's Counsel. In 8vo. Price 7*s*. 6*d*. cloth. 1866.

Rawlinson's Corporation Acts. Fifth Edition.

The Municipal Corporation Act, 5 & 6 Will. IV. c. 76, and the Acts since passed for amending the same, and otherwise in relation to Municipal Corporations, with Notes and References to the Cases thereon; and an Appendix, containing the principal Statutes referred to, including those relating to Mandamus and Quo Warranto; a List of Boroughs having Quarter Sessions; Borough Court Rules, &c. By SIR CHRISTOPHER RAWLINSON, late Chief Justice of Madras. Fifth Edition. By THOS. GEARY, of the Middle Temple, Barrister-at-Law. 12mo. Price 1*l*. 4*s*. cloth. 1868.

Taylor's Law of Evidence. Fifth Edition.

A Treatise on the Law of Evidence, as administered in England and Ireland, with Illustrations from the American and other Foreign Laws. By JOHN PITT TAYLOR, Esq., Judge of the County Courts for Lambeth, Greenwich and Woolwich. In 2 vols. Royal 8vo. Price 3*l.* 10*s.* cloth. 1868.

Maclachlan's Law of Merchant Shipping.

A Treatise on the Law of Merchant Shipping; with Supplement. By David MACLACHLAN, M.A., of the Middle Temple, Barrister-at-Law. In 1 vol. Royal 8vo. Price 1*l.* 16*s.* cloth. 1862.

"That case (*Cammell* v. *Sewell*) is well commented on in a work on the Law of Shipping by Mr. Maclachlan, which, so far as I have seen, appears to me an acquisition to legal literature."—Per Williams, J., in *Maitland and others* v. *Graham and others*, *coram* C. B. 14 Nov. 1860.

"It is not so laid down in a book I was looking into last night, the work upon Shipping by Mr. Maclachlan, which is an excellent, able and well-written work."—Per Cockburn, L C.J., in *Castrique* v. *Imrie*, *coram* Exch. Ch. 30 Nov. 1860.

Davidson's Precedents in Conveyancing.

Precedents and Forms in Conveyancing, with an Introduction and Practical Notes. By CHARLES DAVIDSON, THOMAS COOKE WRIGHT, J. WALEY, Esqrs., of Lincoln's Inn, and J. WHITEHEAD, Esq., of the Middle Temple, Barristers-at-Law. In 5 vols. Royal 8vo. Price 10*l.* 18*s.* cloth. 1860-69.

Christie's Concise Precedents of Wills. Second Edition.

Concise Precedents with an Introductory Essay on the Law of Wills, adapted as a Manual for the ready use of Solicitors. By JAMES TRAILL CHRISTIE, Esq., of the Middle Temple, Barrister-at-Law. 12mo. Price 15*s.* cloth. 1857.

Yool's Essay on Waste, Nuisance and Trespass.

An Essay on Waste, Nuisance and Trespass, chiefly with reference to *Remedies in Equity* treating of the *Law of Timber, Mines, Lights, Water, Support, the Construction of Public Works, &c.* By GEO. V. YOOL, M.A., of Lincoln's Inn, Barrister-at-Law, late Fellow of Trinity College, Cambridge. 8vo. Price 10*s.* 6*d.* cloth. 1863.

Smith's Mercantile Law. Eighth Edition.

A Compendium of Mercantile Law. By JOHN WILLIAM SMITH, Esq., of the Inner Temple, Barrister-at-Law. Eighth Edition, by G. M. DOWDESWELL, Esq., of the Inner Temple, Barrister-at-Law. Royal 8vo. (*In the Press.*)

Smith's (John Wm.) Law of Contracts. Fifth Edition.

By J. G. MALCOLM. In 1 vol. Demy 8vo. Price 16*s.* cloth. 1868.

Smith's Action at Law. Tenth Edition. By Prentice.

An Elementary View of the Proceedings in an Action at Law. By JOHN WILLIAM SMITH, Esq., late of the Inner Temple, Barrister-at-Law; Author of "Leading Cases," "A Compendium of Mercantile Law," &c. The Tenth Edition, adapted to the Present Practice. By SAMUEL PRENTICE, Esq., Barrister-at-Law. 12mo. Price 12*s.* 1868.

Westlake's Conflict of Laws.

A Treatise on Private International Law, or the Conflict of Laws, with Principal Reference to its Practice in the English and other Cognate Systems of Jurisprudence. By JOHN WESTLAKE, of Lincoln's Inn, Esq., Barrister-at-Law, and Fellow of Trinity College, Cambridge. In 1 vol. 8vo. Price 12*s.* cloth. 1858.

"A work that will be a permanent addition to legal literature. It is not a mere compilation, but an *original treatise, which the student will read with profit, and the practitioner consult with advantage.*"—*Law Times, May 28, 1859.*

Baker's Law of Burials. Third Edition.

The Laws relating to Burials; with Notes, Forms and Practical Instructions. By THOMAS BAKER, Esq., of the Inner Temple, Barrister-at-Law (of the Burial Acts Office). Third Edition, including the Statutes of the Present Session, and the Scotch and Irish Acts. 12mo. Price 7*s*. 6*d*. cloth. 1863.

Tudor's Leading Cases on Mercantile and Maritime Law. Second Edition.

A Selection of Leading Cases on Mercantile and Maritime Law, with Notes. Second Edition. By OWEN DAVIES TUDOR, Esq., Barrister-at-Law. In 1 vol. Royal 8vo. Price 1*l*. 18*s*. cloth. 1868.

Woodfall's Law of Landlord and Tenant.

A Practical Treatise on the Law of Landlord and Tenant, by WOODFALL. The Ninth Edition, greatly altered and enlarged; with a full Collection of Precedents and Forms of Procedure. By W. R. COLE, Esq., of the Middle Temple, Barrister-at-Law. 1 thick vol. Royal 8vo. 1*l*. 18*s*. cloth. 1867

Hawkins on Wills.

A Concise Treatise on the Construction of Wills. By F. VAUGHAN HAWKINS, M.A., of Lincoln's Inn, Barrister-at-Law, and Fellow of Christ's College, Cambridge. 8vo. Price 10*s*. 6*d*. cloth. 1863.

Warren's Law Studies. Third Edition.

A Popular and Practical Introduction to Law Studies, and to every Department of the Legal Profession. By SAMUEL WARREN, of the Inner Temple, Esq., D.C.L. Oxon, F.R.S., one of Her Majesty's Counsel, Recorder of Hull, and Master in Lunacy. Third Edition, entirely re-written and greatly enlarged. In 2 vols. 8vo. Price 2*l*. 12*s*. 6*d*. cloth. 1863.

Bateman's Law of Auctions. Fourth Edition.

The Auctioneer's Guide, containing a Practical Treatise on the Law of Auctions; with a complete Series of Conditions of Sale, Rules for Valuing Property, the Law of Distress, and numerous Forms, Tables and Precedents. By J. BATEMAN, Esq., LL.D, of Lincoln's Inn, Barrister-at-Law, Assistant Solicitor of Excise, &c. Fourth Edition, adapted to the recent Alterations in the Law. By ROLLA ROUSE, of the Middle Temple, Barrister-at-Law. 12mo. Price 10*s*. 6*d*. cloth. 1863.

Petheram on Interrogatories.

The Law and Practice relating to Discovery by Interrogatories under the Common Law Procedure Act, 1854; together with an Appendix of Precedents and full Index. By WM. COMER PETHERAM, Esq., of the Middle Temple. Crown 8vo. Price 3*s*. 6*d*. cloth. 1864.

Craig's Rights as to Trees and Woods.

Legal and Equitable Rights and Liabilities as to Trees and Woods. By RICHARD DAVIS CRAIG, Esq., one of Her Majesty's Counsel. In 8vo. Price 7*s*. 6*d*. cloth. 1866.

Rawlinson's Corporation Acts. Fifth Edition.

The Municipal Corporation Act, 5 & 6 Will. IV. c. 76, and the Acts since passed for amending the same, and otherwise in relation to Municipal Corporations, with Notes and References to the Cases thereon; and an Appendix, containing the principal Statutes referred to, including those relating to Mandamus and Quo Warranto; a List of Boroughs having Quarter Sessions; Borough Court Rules, &c. By SIR CHRISTOPHER RAWLINSON, late Chief Justice of Madras. Fifth Edition. By THOS. GEARY, of the Middle Temple, Barrister-at-Law. 12mo. Price 1*l*. 4*s*. cloth. 1868.